RESEARCH PAPER 05/90
19 DECEMBER 2005

The *Government of Wales Bill* 2005

Bill 100 2005-06

The *Government of Wales Bill*, Bill 100 2005-06, had its first reading in the House of Commons on 8 December 2005.

It makes changes to the way devolution works in Wales. It repeals most but not all of the *Government of Wales Act 1998*. It creates a separation of powers between the legislature (the National Assembly for Wales) and the executive (the Welsh Assembly Government). It creates a new power for the Assembly to make law in devolved areas (Assembly measures) which can go much further than is currently the case. It provides for primary law-making powers, but these will not come into force unless approved in a referendum and, before that, by both Houses of Parliament and by a two-thirds majority in the Assembly. It changes the electoral system to prevent candidates from standing both in a constituency and on a party list at the same election. It makes various consequential provisions, such as the establishment of a Welsh Consolidated Fund and an Assembly Commission.

Paul Bowers and Oonagh Gay

PARLIAMENT AND CONSTITUTION CENTRE

Dominic Webb

ECONOMIC POLICY AND STATISTICS SECTION

Ross Young

SOCIAL AND GENERAL STATISTICS SECTION

HOUSE OF COMMONS LIBRARY

Recent Library Research Papers include:

05/75	Background to the Forthcoming *Armed Forces Bill*	11.11.05
05/76	Unemployment by Constituency, October 2005	16.11.05
05/77	*Equality Bill* [Bill 85 of 2005-06]	17.11.05
05/78	*Northern Ireland (Offences) Bill* [Bill 81 of 2005-06]	17.11.05
05/79	The *Health* Bill: Part I Smokefree premises, places and vehicles [Bill 69 of 2005-06]	22.11.05
05/80	The *Health Bill* (excluding Part 1) [Bill 69 of 2005-06]	23.11.05
05/81	The *Childcare Bill* [Bill 80 of 2005-06]	23.11.05
05/82	The *Work and Families Bill* [Bill 60 of 2005-06]	24.11.05
05/83	The *Criminal Law (Amendment) (Protection of Property) Bill* [Bill 18 of 2005-06]	28.11.05
05/84	Economic Indicators, December 2005	01.12.05
05/85	The UK Parliament and European Business	02.12.05
05/86	The *Armed Forces Bill* [Bill 94 of 2005-06]	07.12.05
05/87	The *Animal Welfare Bill* [Bill 58 of 2005-06]	07.12.05
05/88	The *Criminal Defence Service Bill* [Bill 64 of 2005-06]	09.12.05
05/89	Unemployment by constituency November 2005	14.12.05

Research Papers are available as PDF files:

- *to members of the general public on the Parliamentary web site, URL:* ***http://www.parliament.uk***
- *within Parliament to users of the Parliamentary Intranet, URL:* ***http://hcl1.hclibrary.parliament.uk***

Library Research Papers are compiled for the benefit of Members of Parliament and their personal staff. Authors are available to discuss the contents of these papers with Members and their staff but cannot advise members of the general public. Any comments on Research Papers should be sent to the Research Publications Officer, Room 407, 1 Derby Gate, London, SW1A 2DG or e-mailed to PAPERS@parliament.uk

ISSN 1368-8456

Summary of main points

Discontent over the devolution settlement for Wales has revolved around two main issues: the power of the National Assembly for Wales to make laws, and the institutional structure of that body. There have also been concerns about the operation of the electoral system and the overall size of the Assembly given its responsibilities.

The Assembly has made relatively little law, and its powers are limited and lacking coherence. They are secondary powers only, and they are derived from a range of sources, being inherited from the Secretary of State who had accumulated them under various enactments. They do not amount to a package for running Wales. Beyond this, devolutionists look with affection at the primary powers available to the Scottish Parliament, and they hope for the same in Wales.

The Assembly has a structure, influenced by a local authority model, which requires it to carry out legislative and executive functions at the same time. This is at odds with the commonsense understanding that there is a Welsh Assembly Government and a National Assembly for Wales to scrutinise it.

In addition to these concerns, the UK Government and others are unhappy with an aspect of the electoral system. The elections to the National Assembly for Wales combine first-past-the-post constituency contests with regional lists in what is known as the Additional Member System. In practice, some candidates stand in both types of contest, and some who have been defeated in a constituency election have been elected to the Assembly from a regional list instead. The Government regards this as anomalous in that it leads to defeated constituency candidates sitting alongside successful ones. Others argue that this is only an acute expression of the inherent tension between the two types of members in a mixed system, and that a switch to the Single Transferable Vote system would be preferable to changes that preserve the mixture.

The *Government of Wales Bill* seeks to address these various concerns.

The Bill introduces an unusual way of legislating. The Assembly will be able to pass "Assembly measures" to make almost any provision that an Act of Parliament could make, so long as it relates to a matter that has been specified in an Order in Council as falling within its competence. The Secretary of State will have the power to block an Assembly measure in some circumstances. The Assembly itself will bid for the Orders in Council that specify its competence, and the Secretary of State has a wider power to block these.

The Bill also provides for primary legislative powers, but these will not come into force unless approved in a referendum and, before that, by both Houses of Parliament and by a two-thirds majority in the Assembly. The referendum would be unusual in that it would be commissioned by Order in Council rather than by a separate Act of Parliament.

The Bill effects a formal separation between the legislature and the executive. As a result of this, the existing institution called "the National Assembly for Wales" will cease to exist, and its body corporate status will thus disappear. A new legal personality must be created to enable the new legislature, also called the National Assembly for Wales, to

enter contracts, hold property and perform other legal acts. The Bill achieves this by establishing an Assembly Commission, modelled after the House of Commons Commission and the Scottish Parliamentary Corporate Body.

The Bill also sets up a new Welsh Consolidated Fund.

The Bill makes a number of changes to the electoral system. By far the most controversial is the prohibition on candidates simultaneously standing in a constituency election and appearing on a regional list. The same system is in operation in Scotland and the Government does not intend to change it there.

CONTENTS

I	**Pressure for change in the Welsh settlement**	7
	A. The settlement	7
	B. Criticism	7
	C. Richard Commission	8
	1. Law making	8
	2. Separation of legislature and executive	10
	3. Electoral system	11
	D. Developments in response to the Richard Commission	13
II	**The White Paper**	14
	A. Proposals	14
	1. Separation of legislature and executive	14
	2. Law making	16
	3. Electoral system	20
	B. Responses to the White Paper	22
	1. Summary	22
	2. Politicians and parties	22
	3. NAW Committee	25
	4. Welsh Affairs Committee	34
III	**The Bill**	34
	A. Separation of legislature and executive	35
	1. National Assembly for Wales	35
	2. Welsh Assembly Government	45
	B. Law making	49
	1. Enhanced legislative powers	49
	2. Primary legislative powers	56
	C. Electoral system	59
	D. Welsh Consolidated Fund	62

E. Reactions to the Bill 66

IV Annex A 69

V Annex B 70

I Pressure for change in the Welsh settlement

A. The settlement

Devolution in Wales was established by the *Government of Wales Act 1998*.[1]

The preceding bill was discussed in Research Papers 97/129, *The Government of Wales Bill: devolution and the National Assembly*, 97/130, *The Government of Wales Bill: the National Assembly's partners*, and 97/132, *The Government of Wales Bill: operational aspects of the National Assembly*.[2] Research Paper 98/38, *Cabinets, Committees and Elected Mayors*, was also relevant as it described the changes which occurred during the passage of the Bill allowing delegation of functions to a Welsh Executive.

Further information on how devolution has been working in practice is available in a number of publications on the Library's intranet.[3] These include Research Paper 03/45, *Welsh Assembly Elections: 1 May 2003*, at:

http://www.parliament.uk/commons/lib/research/rp2003/rp03-045.pdf

Under the 1998 Act the National Assembly for Wales (NAW, the Assembly) was created as a body corporate, with a single legal personality and no formal distinction between the executive and the legislature. The executive powers of the Secretary of State were transferred to the Assembly, and this 60-member body was given powers of secondary legislation within the devolved fields. Those fields were set out in Schedule 2 to the 1998 Act. A system of proportional representation, the Additional Member System (AMS), was adopted. 40 first-past-the-post members and 20 regional list members are elected to the Assembly every four years in fixed-term elections.

B. Criticism

The settlement attracted criticism from various sides.

In a broad sense there were concerns that the law-making powers of the Assembly either went too far or did not go far enough. Many commentators pointed to the relatively low level of legislation passing through Cardiff, and to the very limited scope that the Assembly enjoyed for influencing the statutory framework for Wales.

There were also more detailed preoccupations. For instance, the absence of a formal separation of powers led to a gap between the commonsense perception that Wales had a legislature and an executive, and the constitutional reality that it had a single Assembly

---

[1] http://www.opsi.gov.uk/acts/acts1998/19980038.htm.

[2] http://hcl1.hclibrary.parliament.uk/wdw/rp/RPlist.asp?rpyear=1997.

[3] http://pims.parliament.uk/portal/site/PIMS/template.MAXIMIZE/menuitem.aae3f40ff2a1f0819b02df09a4f0a7a0/?javax.portlet.tpst=aad025a7d197e570bae0e510a4f0a7a0_ws_MX&javax.portlet.prp_aad025a7d197e570bae0e510a4f0a7a0_viewID=SEARCH_SHOW_RESULTS_VIEW&javax.portlet.begCacheTok=token&javax.portlet.endCacheTok=token.

seeking to combine both roles. Its staff were civil servants, creating the curiosity that the committees scrutinising the executive were staffed by employees of the UK Government. The basis for the powers of the Assembly was diverse, since the powers inherited from the Secretary of State had accumulated over time under a range of enactments. Finally, the electoral system gave rise to results which the UK Government regarded as anomalous, since failed candidates in first-past-the-post elections were able to enter the Assembly under the regional list part of the poll.

In July 2000, following the creation of partnership government in the Assembly between Labour and the Liberal Democrats, Rhodri Morgan, the First Secretary, ordered an internal review of procedure under the Chairmanship of the Presiding Officer.[4] Consensus was reached on a number of points, most notably the need for sharper separation of powers. In November 2001 Mr Morgan, re-named as "First Minister," announced that the Assembly's Executive Committee was to be known as the Welsh Assembly Government. The Assembly was still a single body corporate in statute, but a move had been made towards creating a separate executive branch of the Assembly in practice.

C. Richard Commission

In 2002 Mr Morgan established a Commission on the Powers and Electoral Arrangements of the National Assembly for Wales. This was chaired by Lord Richard, the former Leader of the House of Lords, and the "Richard Commission" began its work in September 2002.

The *Report of the Richard Commission* was published on 31 March 2004.[5] It made a number of recommendations for reform. These included abolishing the body corporate status of the Assembly, creating an 80-member Assembly elected by the Single Transferable Vote (STV) system of proportional representation, and a timetable for the transfer of primary legislative powers by 2011.

Standard Note SN/PC/3018, *Report of the Commission on the Powers and the Electoral Arrangements of the National Assembly for Wales*, gives a full analysis.[6] The following discussion is drawn from that note.

1. Law making

In its overview of evidence received the Commission stated that:

> The apparent paradox, of low levels of enthusiasm for what has been achieved and growing support for more devolution, may be explained by two factors:

[4] Further details are available in the *Procedural Guide to the First Assembly* written by the Clerk of the Assembly: http://www.wales.gov.uk/organipo/content/pgfa/index-e.htm.

[5] The *Report of the Richard Commission*, Spring 2004, http://www.richardcommission.gov.uk/content/template.asp?ID=/content/finalreport/index-e.asp.

[6] http://10.160.3.10:81/PIMS/Static%20Files/Extended%20File%20Scan%20Files/LIBRARY_OTHER_PAPERS/STANDARD_NOTE/snpc-03018.pdf.

- The view that the Assembly is held back by its limited powers;
- In spite of criticizing its performance so far, people do trust the Assembly to act in the interests of Wales.[7]

The Commission asserted that maintaining the status quo was not an option. There had been considerable changes to the Assembly's powers since 1999, but this had been an ad hoc process not guided by a coherent policy. The status quo depended on goodwill between the administrations in Westminster and Cardiff, and more formal agreements would be needed if the administrations were led by opposing parties.

The Commission set out a vision for the Assembly:[8]

> The Assembly is the democratically elected representative body for the whole of Wales. The Welsh Assembly Government should be able to formulate policies within clearly defined fields, and should have the power to implement all the stages for effective delivery, in partnership with the UK Government and other stakeholders. The Assembly Government should be able to set its own priorities and timetables for action. It should be accountable to the people of Wales through the elected Assembly for its policies and their implementation.

The Commission considered two approaches to achieving this vision.[9] One would be for the UK Parliament to pass acts conferring broad secondary powers on the Assembly, so as to allow it to make whatever changes it wished within the subject areas defined by those acts. Another would be to confer primary powers on the Assembly, with a range of consequential changes to it, such as separating the executive and the legislature and changing the size of the Assembly and the electoral system.

The Commission recommended the second option, which it called a legislative Assembly for Wales, and which drew on the models of devolution in Scotland and Northern Ireland, while not exactly replicating either. The Commission suggested that the new approach might be in place by 2011, and that the first option, the conferral of broad framework powers to be exercised through secondary legislation, should be expanded as far as possible in the meantime.

The legislative Assembly for Wales was described thus:[10]

Box 13.5: A legislative Assembly for Wales

Wales Bill needed to amend Government of Wales Act and confer primary law-making powers on the Assembly;

Bill specifies reserved matters (Westminster legislates); everything is devolved to the Assembly unless specifically reserved;

---

7 *Report of the Richard Commission,* Spring 2004, p44.
8 *Report of the Richard Commission,* Spring 2004, p241.
9 See Chapter 13 of the *Report of the Richard Commission*.
10 The *Report of the Richard Commission*, Spring 2004, p250.

> reserved matters could include: the Constitution, defence, fiscal and monetary policy, immigration and nationality, competition, monopolies and mergers, employment legislation, most energy matters, railway services (excluding grants), social security, elections arrangements (except local elections), most company and commercial law, broadcasting, equal opportunities, police and criminal justice;
>
> devolved matters: the fields set out in Schedule 2 of Government of Wales Act i.e. health, education and training, social services, housing, local government, planning, culture, sport and recreation, the Welsh language, ancient monuments and historic buildings, economic development, industry, tourism, transport, highways, agriculture, fisheries, food, forestry, environment, water and flood defence;
>
> corporate body structure replaced with executive and legislature;
>
> Assembly can construct its own rules of procedure and Standing Orders, adopted by a majority of two thirds;
>
> executive powers in a particular field can be devolved even if the Assembly has no corresponding primary legislative powers;
>
> Cardiff legislative programme might contain around four to six government Bills a year;
>
> change in Membership and electoral system;
>
> option of tax-varying power.

The Commission accepted that there was a strong case in principle that primary legislative powers should carry with them tax-varying powers, but it felt that this was "desirable but not essential to the exercise of primary powers."[11]

2. Separation of legislature and executive

If the principle of the devolution of primary powers were accepted, then the Commission recommended that the structure of the Assembly should be changed from a unitary body to a separate legislature and executive. The Commission found that the concept of a unitary body was no longer sustainable, and that it had contributed to the public's confusion about responsibility for decisions,[12] since the Assembly delegated the exercise of almost all of its functions to the First Minister, who in turn delegated the majority of them to other Assembly Ministers in the Cabinet.[13]

The Commission recommended that there should be a Welsh Assembly Government responsible for executive acts and decisions which would be separate from the National Assembly but directly answerable and accountable to it. The Commission acknowledged

[11] Ibid p258

[12] Ibid, p79

[13] *Government of Wales Act,* section 62(5)

that scrutiny would have to be given much greater priority in the Assembly's work, especially in the committees, if primary legislative powers were given to the Assembly. The present membership of the Assembly would be placed under considerable strain if the Assembly's powers were broadened, especially with an increased scrutiny function, so the Commission recommended that there should be an increase of one third, from 60 to 80, in the number of Assembly members.

3. Electoral system

Increasing the number of Assembly members would have a number of implications. The Commission considered whether the increase could be achieved without changing the present AMS method of election, by doubling the regional list membership. AMS had some advantages, particularly in ensuring that the Assembly included all the major political parties in Wales, but it entailed the disadvantage of creating two types of Assembly member. This had led to disagreements and tensions about the activities of the regional members. The Commission thought that an increase in the number of regional members would only exacerbate this problem, and that the STV system would be the best alternative were the Assembly to be increased in size. This would place all members on the same electoral footing.

The Commission suggested that constituencies could be constructed so that they shared boundaries with UK parliamentary constituencies, and that a range of four to six members per constituency would provide a balance between local accountability and proportionality.[14]

The Commission listed the following advantages and disadvantages of an STV system:

> 39. The advantages of STV are as follows:
>
> - All elected Members are on an equal footing – being elected the same way – and have the same constituency responsibilities;
> - It encourages a genuine interest in every constituency;
> - Multi-Member constituencies could be created relatively easily by grouping Westminster seats, or by using local authority boundaries…
> - It is straightforward for voters to operate…
> - It maximizes voter choice (between candidates of different parties or of the same party, or candidates with no party label) and the incentive to vote and campaign;
> - Constituents have a choice of elected representatives to approach with problems;
> - Few votes are wasted: voters know that their second preference will help elect someone – should their first choice not be elected:
> - It creates opportunities for independent candidates – because the electorate vote for the individual, not necessarily a party:
> - It creates opportunities for diversity…

[14] Ibid, p239

- More or less every vote counts equally and the result is broadly proportional – but the degree of proportionality is affected greatly by constituency size…
- Because individual Members do not have 'safe' seats, STV increases their accountability to their constituency.

40. The disadvantages of the system are:

- Each constituency has several Members – the link between the single Member representative and the constituency is removed;
- It can introduce intra-party competition and factionalism – candidates in the same party have an incentive to compete against each other in campaigns and for constituency casework;
- The size of constituency could be a problem in rural areas;
- If the size of constituency is very large, it can be too easy for quite small parties to get elected;
- The counting system is relatively complex (as is the counting system for the list seats under the AMS system) – although no real problems have been encountered with this in either Northern Ireland or the Republic of Ireland.[15]

The Commission concluded that STV would "maintain the principle of proportionality and would not rule out the possibility of majority government – if the electorate wished it."[16]

As a comparison, Labour has won a majority of Welsh seats in every UK general election since 1970. However, only once in that period has it won more than 50 per cent of the vote in Wales. This was in the 1997 general election, when it won 55 per cent of the vote. The more proportional a voting system, the more likely it will be that a proportional government will be formed.

[15] Ibid, p235-6
[16] Ibid, p239

Share of the vote by party in Wales:
General Elections 1974-2005, Assembly Elections 1999 and 2003

		Con	Lab	Lib	PC	Other	Total
General Elections							
1974	Feb	25.9%	46.8%	16.0%	10.8%	0.6%	100.0%
1974	Oct	23.9%	49.5%	15.5%	10.8%	0.2%	100.0%
1979		32.2%	47.0%	10.6%	8.1%	2.2%	100.0%
1983		31.0%	37.5%	23.2%	7.8%	0.4%	100.0%
1987		29.5%	45.1%	17.9%	7.3%	0.2%	100.0%
1992		28.6%	49.5%	12.4%	8.9%	0.6%	100.0%
1997		19.6%	54.7%	12.3%	9.9%	3.4%	100.0%
2001		21.0%	48.6%	13.8%	14.3%	2.3%	100.0%
2005		21.4%	42.7%	18.4%	12.6%	5.0%	100.0%
Assembly Elections (constituency and regional total)							
1999		16.2%	36.5%	13.0%	29.5%	4.9%	100.0%
2003		19.5%	38.3%	13.4%	20.5%	8.3%	100.0%

Sources: Rallings and Thrasher, *British Electoral Facts 1832-1999*, PRS (2000)
House of Commons Library Research Papers 03/45, 03/59, and 05/33

The Commission also pointed out that an increase in the number of Assembly members would entail an increase in the capacity of the Presiding Office, in order to cope with the additional numbers and additional scrutiny work.[17]

D. Developments in response to the Richard Commission

In August 2004 the Welsh Labour party published a policy document entitled *Better Governance for Wales*. It stated that, if reelected, the Government would propose:

> the extension of the Assembly's existing secondary legislative powers under framework legislation, and then following a consultative White Paper a Government of Wales Amendment Act to develop enhanced legislative powers, reform the electoral system and change corporate body status.[18]

In the same document the Welsh Labour party rejected the proposals for STV, but opted for limited reform of AMS.

In October 2004, during debate in plenary on the *Report of the Richard Commission*, the Assembly passed a Motion calling on the First Minister to

> urge the Secretary of State for Wales to bring forward proposals to amend the Government of Wales Act 1998 for the following purposes:

[17] Ibid, p257
[18] *Better Governance for Wales: A Welsh Labour Policy Document*, August 2004, p3.

(a) to effect a formal separation between the executive and legislative branches of the Assembly
(b) to reform existing electoral arrangements in order to eliminate anomalies
(c) to enhance the legislative powers of the Assembly.

Following the return of the Labour Government in the May 2005 general election a commitment to "reform the National Assembly for Wales" was included in the Queen's Speech.[19] Peter Hain, the Secretary of State for Wales, fleshed out this commitment, stating the Government's intention to "enhance the Assembly's powers, while reforming its structure and electoral system to make a more accountable legislature for the people of Wales."[20]

The White Paper, *Better Governance for Wales*, followed in June 2005.[21]

II The White Paper

A. Proposals

The White Paper proposed major changes in three areas, with consequential changes in others. In some areas it stayed close to the thrust of the Richard Commission, but it proposed a more cautious approach to the important question of primary powers. It proposed a formal separation of powers between the executive and the legislature, enhanced powers for the NAW to legislate, and an end to dual candidature in constituency and regional list elections.

1. Separation of legislature and executive

As mentioned above the National Assembly for Wales is a body corporate with a single legal personality, and there is no formal division between executive and legislature.[22] In creating this arrangement the 1998 Act drew on practice in local government at the time.[23] However, restrictions and anomalies deriving from this structure are acknowledged on all sides, and indeed local government itself has changed. The difficulties were raised in the *Report of the Richard Commission*,[24] and similar concerns were outlined in the White Paper:[25]

- Accountability is confused: formally, under the present arrangements, it is the Assembly which makes a decision, but in practice it is Welsh Assembly Government Ministers who have taken those decisions under their delegated powers, and Assembly Members (AMs) may not know anything about them.

[19] The Queen's Speech, 17 May 2005.
[20] *Wales Office Press Notice*, see: walesoffice.gov.uk/pn_20050517.html.
[21] Cm 6582.
[22] *Better Governance for Wales*, para 2.3, p11.
[23] See RP 98/38, *Cabinets, Committees and Elected Mayors*, 19 March 1998.
[24] *Report of the Richard Commission*, pp48-50.
[25] The following is summarised from *Better Governance for Wales*, para 2.4.

- The civil service supporting the Assembly is expected to serve both the Ministers discharging executive functions and the legislative branch of the Assembly which holds Ministers to account. This could lead to a position of conflicting loyalties.

- Ministers act as delegates on behalf of the Assembly, not in their own right as appointees of the Crown. Their delegated authority could be taken away at any time by a simple majority vote in the Assembly.

- Ministers cease to be AMs immediately before an election, so there are no elected politicians who can exercise executive functions until after a new First Minister has been elected by the Assembly.

The Assembly has also seen weaknesses in its own institutional design. In February 2002 it unanimously agreed a resolution calling for "as clear as possible a separation between the work of its executive and legislative arms as the legal constraints of the Government of Wales Act permit."[26] Later, in response to the Richard Commission's recommendations,[27] the Assembly adopted a resolution calling for legislation to effect a formal separation between its executive and legislative branches.[28]

The White Paper outlined the Government's proposals to amend the 1998 Act so as to remove the body corporate status of the Assembly. This would allow the creation of a separate executive authority for Wales, fully accountable to the Assembly, but legally distinct from it.[29] The terms "First Minister" and "Assembly Minister" would be put on a statutory footing. The Crown would appoint the First Minister on the nomination of the Assembly, and the Ministers would discharge their legal responsibilities on behalf of the Crown, rather than by delegation on behalf of the Assembly. The Ministers would be known collectively as the Welsh Assembly Government.[30]

In order to facilitate and enable the separation various other changes would be made. A new statutory post of Counsel General to the Assembly Government would be created;[31] future Acts of Parliament would confer executive functions on Welsh Assembly Government Ministers rather than on the Assembly;[32] civil servants would work exclusively for Welsh Assembly Government Ministers; the staff working for the Assembly would not be civil servants;[33] and Ministers would no longer be members of subject committees, thereby strengthening the committees' power of scrutiny.[34]

---

[26] *Better Governance for Wales,* para 2.5, p13.

[27] *Report of the Richard Commission*, p258.

[28] National Assembly for Wales Plenary Debate, October 2004.

[29] *Better Governance for Wales*, para 2.1, p11.

[30] *Better Governance for Wales*, para 2.6. The Presiding Officer, Dafydd Elis-Thomas has been critical of this, stating that "the 'Government of Wales' would provide greater democratic clarity." See http://news.bbc.co.uk/1/hi/wales/4624737.stm.

[31] *Better Governance for Wales*, para 2.9, p14. A post of this name, with different characteristics, existed in the early days of the NAW, but has fallen into disuse.

[32] *Better Governance for Wales*, para 2.13, p16.

[33] *Better Governance for Wales*, para 2.10 and 2.20, pp14 and 18.

[34] *Better Governance for Wales*, para 2.16, p17.

These changes would have an impact on the Assembly's procedures and Standing Orders. In the White Paper the Government

> proposes that the Secretary of State should take powers to make a new set of Standing Orders for the Assembly. The Secretary of State would be assisted by an advisory committee with a broad-based representative membership.[35]

The White Paper acknowledged that the 1998 Act was highly prescriptive on the form that Assembly procedures would take, and it proposed that the Assembly should be given greater freedom to arrange its procedures, as is the case in the Scottish Parliament. Furthermore, the existing joint working and parallel scrutiny between the Welsh Affairs Committee and the relevant Assembly subject committee was described in the White Paper as a "useful and worthwhile experiment," and it was envisaged that this could be built into both the House of Commons's and the Assembly's Standing Orders.[36]

2. Law making

The White Paper stated that:

> Experience has shown that the Assembly's current legislative powers are too fragmented to enable the Assembly Government to implement its policies as effectively as it should. The Assembly's powers do not amount to a coherent whole; they arise under many different Acts and vary both in their scope and in their significance to the discharge of the Assembly's functions.[37]

In his statement to the Assembly Mr Hain described the proposals in the White Paper as "a route map to achieve primary law-making powers" and a "three-staged move towards full legislative powers for the Assembly."[38] In broad terms the first and third of these stages echo the two options set out in the *Report of the Richard Commission*, for broader delegation within the existing settlement or for primary powers. However, Mr Hain argued that there was no consensus in Wales for a move to primary powers, and the White Paper used a modest vocabulary, outlining a "more gradual, staged move towards greater legislative powers,"[39] with a significant hurdle to jump before the final stage could be reached. Instead, a new intermediate stage, known as "enhanced legislative powers," would be introduced as the resting place for Welsh devolution for the time being.

---

[35] *Better Governance for Wales,* para 3.31, p27.
[36] *Better Governance for Wales,* para 3.33, p27.
[37] *Better Governance for Wales*, para 3.5, p20.
[38] Available at http://www.wales.gov.uk/assemblydata/N0000000000000000000000000032911.pdf.
[39] *Better Governance for Wales*, para 3.8, p21.

a. Stage 1: framework legislation

Stage 1 involved adopting, with immediate effect, a "more permissive" attitude to Wales-only clauses in Westminster Bills covering both countries. In practice this meant drafting "parliamentary bills in a way that gives the Assembly wider and more permissive powers to determine the detail of how the provision should be implemented in Wales."[40] This did not require any change to the 1998 Act, but built on precedents set in health and education legislation (e.g. new powers in the areas of animal health, and in taking responsibility for the Children and Family Court Advisory and Support Service, CAFCASS, in Wales).[41] The Government argued that a "more consistent approach to drafting legislation in Wales" was required.[42]

This stage, to be implemented immediately as a matter of policy, was similar to the "framework" model of legislation, outlined in box 13.2 of the *Report of the Richard Commission*.[43] The first example of a "framework" provision of this kind was included in the *NHS Redress Bill*, which was introduced in the Lords on 12 October 2005.[44] According to the Explanatory Notes on that Bill, which creates a scheme for out-of-court settlement of certain claims against the NHS,[45]

> Clause 17 of the Bill gives a regulation-making power to the National Assembly for Wales. The broad framework power enables the National Assembly by regulations to make any provision that could be made by an Act of Parliament (subject to certain limitations) with regard to providing a mechanism for the out-of-court settlement of claims in tort arising out of services provided as part of the health service in Wales.

Clause 17 of the *NHS Redress Bill* reads:

> **17 Framework power**
>
> (1) The National Assembly for Wales may by regulations made by statutory instrument make provision—
>
> (a) for the purpose of enabling redress to be provided without recourse to civil proceedings in circumstances in which, under the law of England and Wales, qualifying liability in tort arises in connection with the provision of services (in Wales or elsewhere) as part of the health
> service in Wales;
> (b) for any purpose connected with provision under paragraph (a).
>
> (2) The reference in subsection (1)(a) to qualifying liability in tort is to liability in tort owed in respect of or consequent upon personal injury or loss arising out of or in

---

[40] Statement by Peter Hain, Secretary of State for Wales, HC Deb 15 June 2005, c263.
[41] *Better Governance for Wales*, p5.
[42] *Better Governance for Wales*, para 3.12, p21.
[43] *Report of the Richard Commission*, p244.
[44] HL Bill 22, 2005-06, now republished as HL Bill 45, 2005-06.
[45] *NHS Redress Bill Explanatory Notes*, Bill 22-EN, 2005-06, para 7.

> connection with breach of a duty of care owed to any person in connection with the diagnosis of illness, or the care or treatment of any patient.
>
> (3) Subject to subsection (4), the provision that may be made under subsection (1) includes any provision that could be made by an Act of Parliament.
>
> (4) The power conferred by subsection (1) shall not include power—
>
> (a) to make any provision imposing or increasing taxation;
> (b) to make provision taking effect from a date earlier than that of the making of the instrument containing the provision;
> (c) to confer any power to legislate by means of orders, rules, regulations or other subordinate instrument, other than rules of procedure for any court or tribunal;
> (d) to create any new criminal offence;
> (e) to make provision extending otherwise than to England and Wales;
> (f) to make provision applying in relation to England, without the consent of the Secretary of State.
>
> (5) Subsection (4)(c) does not preclude the modification of a power to legislate conferred otherwise than under subsection (1), or the extension of any such power to purposes of a like nature as those for which it was conferred.
>
> (6) A power to give directions as to matters of administration is not to be regarded as a power to legislate within the meaning of subsection (4)(c).
>
> (7) The power under subsection (1)(a) (as well as being exercisable in relation to all cases to which it extends) may be exercised in relation to all those cases subject to exceptions or in relation to any particular case or class of case.

The *Report of the Richard Commission* described framework legislation as an "interim, and as a bridge to full legislative competence … allowing maximum scope for the Assembly to exercise its secondary legislative powers."[46] It was acknowledged in the White Paper that this approach "does not fully address the weaknesses that have become apparent in the present system."[47] However, instead of proposing the direct transition from this to primary powers recommended by the Richard Commission, the White Paper proposed an intermediate stage, that of enhanced legislative powers.

b. Stage 2: enhanced legislative powers

Stage 2 was described as a "fast track" approach, and while it required changes to current legislation, it was not regarded as a fundamental change to the original settlement, and so it did not require a referendum.[48] Parliament would give the Assembly powers to modify legislation or to make new provision on devolved matters. It would do so by means of an Order in Council specifying the subject matter to which the new power would apply. This would allow the Welsh Assembly Government to carry out its programme without having to wait for a suitable bill or timeslot at Westminster. In his

[46] *Report of the Richard Commission*, p256.
[47] *Better Governance for Wales*, para 3.13, p22.
[48] *Better Governance for Wales*, para 3.22, p25.

statement to the Assembly Mr Hain said that this streamlined process, or "enhanced powers," would begin in 2007, "earlier than the 2011 the Richard Commission envisaged."[49] The Richard Commission was referring to primary powers when it cited 2011 as a date for introduction.[50]

A paper was deposited in the House of Lords Library listing Bills, or provisions of Bills, which could have been enacted under this procedure.[51] It is reproduced in Annex B to this Paper.

The enabling Orders in Council would be made at the request of the Welsh Assembly Government, they would be laid by the Secretary of State for Wales and they would be subject to the affirmative procedure in both Houses of Parliament.

In his statement to the Assembly Mr Hain suggested that the "Assembly will have to specify in great detail what its legislative modifying effect might be."[52] In response to a question from Chris Bryant in the House of Commons, which noted that the Order in Council procedure did not allow for amendment of Orders, Mr Hain stated that there would be a period of scrutiny before the Order was laid.[53]

The White Paper gave examples of three types of possible Orders. The first could relate to something very specific, such as the functions of the Ombudsmen in Wales. The second could relate to a broader issue, such as the protection and welfare of children, described as a "limited policy area, but one cutting across a range of the Assembly's functions, such as education, local government and social care."[54] The third could relate to something much wider, such as the structure of the NHS in Wales.

c. Stage 3: "primary legislative powers"

Stage 3 would involve transferring primary powers over all devolved fields to the Assembly.[55] Provision for this would be included on the face of the Bill.[56] However, the Government regarded this as a fundamental change to the settlement in Wales. Therefore it would happen only if the electorate approved it in a referendum, triggered by a two-thirds majority of AMs, and after approval by both Houses of Parliament. Following this, the Secretary of State would table an Order, although the White Paper

---

[49] Available at http://www.wales.gov.uk/assemblydata/N0000000000000000000000000032911.pdf 25 June 2005.

[50] *Report of the Richard Commission*, para 14.23.

[51] HINF 2005/271, 15 June 2005.

[52] Available at http://www.wales.gov.uk/assemblydata/N0000000000000000000000000032911.pdf 25 June 2005.

[53] HC Deb 15 June 2005, c273.

[54] *Better Governance for Wales,* 3.18, p23.

[55] Technically there are difficulties over the term "primary legislative powers," since these reside with the UK Parliament as a feature of its sovereignty. As in Scotland, full legislative powers would be devolved to the Assembly without prejudice to the sovereignty of the UK Parliament. For convenience this Paper uses "primary legislative powers" to indicate such devolved powers.

[56] http://www.wales.gov.uk/assemblydata/N0000000000000000000000000032911.pdf.

noted that "if the Secretary of State was minded to table an Order in Parliament, he would first be obliged to undertake such consultation as he considered appropriate."[57]

In his statement to the NAW Mr Hain said that "primary powers will be on the statute book by late autumn next year,"[58] but he added that the Government had "no current plans for … a referendum"[59] to instigate this stage. In his statement to the House of Commons he indicated that a referendum would not be considered by the present Government during the next NAW term:[60]

> I note that the Richard commission itself saw the acquisition of primary powers as a process that would take a number of years to achieve, and not before 2011. My view is that the new Assembly arrangements should be allowed to bed down through the next Assembly term—between 2007 and 2011—and that there is no case for considering a referendum until at least the following Assembly term of office.

3. Electoral system

The White Paper rejected the Richard Commission's proposal to create an 80-member Assembly elected on an STV system. Instead it sought to "clarify the respective roles of constituency and list members and strengthen accountability."[61] The Government therefore proposed to "prevent individuals from simultaneously being candidates in constituency elections and being eligible for election from party lists,"[62] thereby addressing what has become known as the Clwyd West question.

In the 2003 Assembly elections five candidates stood in the first-past-the-post election in the Clwyd West constituency, four of whom ultimately became AMs.[63] In total, in the 2003 elections, 17 of the 20 AMs elected from lists were candidates who lost constituency contests.[64] Mr Hain emphasised this point in his statement to the House of Commons:

> **Mr. Hain:** I thank my hon. Friend for her support. I shall deal specifically with the important point that she made about the list system. Particularly in the light of the beneficiaries of this hybrid system, it has been a matter of controversy. In Cardiff, Central, a candidate was elected on the basis of just 8.7 per cent. of the vote. In Caerphilly, a Conservative candidate was elected on just 10.1 per cent. of the vote; and in Clwyd, West, a Liberal Democrat was elected on a mere 7.9 per cent. That is simply indefensible. Candidates should stand in one category or the other, not both.[65]

---

[57] *Better Governance for Wales*, para 3.24, p25.
[58] Available at http://www.wales.gov.uk/assemblydata/N0000000000000000000000000032911.pdf.
[59] Available at http://www.wales.gov.uk/assemblydata/N0000000000000000000000000032911.pdf.
[60] HC Deb 15 June 2005, c264.
[61] *Better Governance for Wales,* para 4.1, p28.
[62] *Better Governance for Wales,* para 4.4, p28.
[63] *Better Governance for Wales*, para 4.5, p28.
[64] Written Evidence from the Electoral Reform Society, cited in the *Report of the Richard Commission*, p233.
[65] HC Deb 15 June 2005, c270.

The same system of allowing constituency candidates to contest the regional list is in operation for the Scottish Parliament and the London Assembly. Harriet Harman, Minister of State at the Department for Constitutional Affairs, was asked what plans the Government had to change the electoral system in Scotland and London to prevent party list candidates running for constituency seats. She said,[66]

> an internal review of the experiences of the new UK voting systems introduced for the devolved Administrations, the European Parliament and London Assembly elections is being conducted by officials within my Department. It is at an early stage, and any decisions regarding the next steps for the review will be taken in due course.
>
> With regards to the Scottish Parliament, the Secretary of State for Scotland, my right hon. Friend the Member for Edinburgh, South-West (Mr. Darling), set up the Commission on Boundary Differences and Voting Systems in July 2004 under the chairmanship of Professor Sir John Arbuthnott. The Commission has been asked to report by December 2005.

Jimmy Hood further probed the question of AMS in Scotland:[67]

> **Mr. Hood:** To ask the Secretary of State for Scotland (1) when his Department expects to make further changes to the system for the elections to the Scottish Parliament; and if he will make a statement; [10752]
>
> (2) what assessment he has made of the effect that the additional member system of voting for elections to the Scottish Parliament has had on Scottish people's perception of the political system; what conclusions he has reached on the extent to which the additional member system has *(a)* encouraged and *(b)* discouraged political engagement; and if he will make a statement. [10753]
>
> **Mr. Darling:** I shall consider whether any changes to the voting system for elections to the Scottish Parliament might be appropriate in the light of the report and recommendations of the Commission on Boundary Differences and Voting Systems, under Sir John Arbuthnott's chairmanship, which is due to report to me at the end of this year.
>
> I expect that the commission will include in its report an assessment of the operation of the additional member system for elections to the Scottish Parliament.

On other electoral matters, the White Paper proposed that fixed term elections should be retained, but with a provision that in extremis an election could be called on the agreement of a two-thirds majority in the Assembly.[68] The White Paper also proposed to extend the Assembly's powers to arrange public information campaigns in order to promote participation in Assembly elections.[69]

---

[66] HC Deb 5 July 2005, c240w.
[67] HC Deb 19 July 2005, cc1524-5w.
[68] *Better Governance for Wales*, para 4.7, p29.
[69] *Better Governance for Wales*, para 4.8, p29.

B. Responses to the White Paper

The formal responses to the White Paper are available on the Wales Office website:

http://www.walesoffice.gov.uk/bgfw.html

In addition the NAW set up a Committee on the White Paper, and the House of Commons Welsh Affairs Committee conducted an inquiry on the subject.

1. Summary

The White Paper was welcomed by most backbench Labour MPs. It was also welcomed by Rhodri Morgan, the First Minister of the National Assembly for Wales, who said that,

> this White Paper shows devolution keeping pace with what is needed to do the job effectively- being innovative but letting people see step by step what the Assembly is able to do with increased powers.[70]

Among the opposition parties there was support for the Government's proposals to separate the legislature and the executive, but there was disagreement on other proposals.

Broadly speaking, devolutionists were concerned that the proposals did not go far and fast enough along the road outlined in the *Report of the Richard Commission* and that Stage 2 was a disappointing alternative to primary powers. On the other hand, sceptics expressed concern that primary powers were being introduced by stealth in Stage 2. There were divisions over the desirability of holding a referendum combined with a two-thirds majority in the NAW and approval by both Houses of Parliament before moving to Stage 3. A number of commentators picked up on matters of detail in the new arrangements for the legal personality of the Assembly. On the opposition benches in both Westminster and Cardiff Bay the proposal to amend the electoral system proved to be highly controversial.

2. Politicians and parties

a. Law making

Responding to the statement in the Commons, Bill Wiggin, the Shadow Secretary of State for Wales, expressed concern that Mr Hain had "given the impression of providing semi-skimmed legislative powers, but this White Paper is a full-fat proposal, stuffed with E numbers."[71] In contrast, Lembit Opik, leader of the Welsh Liberal Democrats, raised concerns over what he described as "centralised control by the back door,"[72] and "a white flag to devolution sceptics."[73]

---

[70] Daniel Davies, "They're the right changes at the right time, Morgan insists," *Western Mail*, 16 June 2005.
[71] HC Deb 15 June 2005 c265.
[72] HC Deb 15 June 2005 c268.
[73] HC Deb 15 June 2005 c269.

Elfyn Llwyd, Plaid Cymru's parliamentary leader, contested the statement that there is no consensus in Wales for primary legislative powers, citing a then recent poll indicating that 64% of those polled were in favour of primary powers.[74] Ieuan Wyn Jones repeated the point in response to the Minister's statement in the Assembly.[75] Lord Richard, Chairman of the Richard Commission, echoed these sentiments in the House of Lords.[76] He gave the White Paper a "B verging on B+."[77] He felt that the White Paper passed the "acid test" of granting greater legislative competence to the Assembly, and he insisted on the need for a clear commitment to primary powers to be included on the face of the Bill.[78]

Lord Livsey expressed concern that the Government's proposals for legislation were "really a half way house." He added that "there is a bit of a get-out clause in adopting part of the Richard Commission report, particularly 13.2, as a final solution."[79] Likewise Professor Laura McAllister, a member of the Richard Commission, said that Stage 2 could only be an interim settlement.[80] Nick Bourne, the Leader of the Welsh Conservatives, described Stage 2 as "a dog's dinner," and Mike German, the Leader of the Liberal Democrats in the Assembly, argued that the proposals presented a "convoluted approach" to primary legislative powers.[81] Lord Morris expressed concerns about how well the interim proposals would work if there were different political colours in Cardiff and Westminster.[82] Mr Wyn Jones echoed these concerns in the Assembly, fearing that this could lead to "serious constitutional problems."[83]

Other concerns focused on the proposals for the "trigger" mechanism for Stage 3. Lord Roberts described the proposals as "not so much a trigger as a blunderbuss to stop a referendum in its tracks."[84] Speaking in the Assembly, Mr Wyn Jones took issue with the requirement for a two-thirds majority there, arguing that a simple majority should be sufficient, and Mr Bourne said that "there is no precedent in the British constitution of requiring this sort of threshold for any legislation."[85] He called for an immediate referendum, saying, "we believe as a party, that there needs to be a referendum now with a series of options."[86] Lord Crickhowell also expressed concerns about the "enormous barrier of a two-thirds majority and the consent of this House combined with that," and described this as an "extraordinary proposal."[87]

---

[74] HC Deb 15 June 2005, c270.
[75] Available at http://www.wales.gov.uk/assemblydata/N0000000000000000000000000032911.pdf.
[76] HL Deb 15 June 2005, c1214.
[77] HL Deb 15 June 2005, c1214.
[78] HL Deb 15 June 2005, c1215.
[79] HL Deb 15 June 2005, c1211.
[80] Daniel Davies "It's a stop gap plan and it could prove difficult," *Western Mail* 16 June 2005.
[81] Available at http://www.wales.gov.uk/assemblydata/N0000000000000000000000000032911.pdf.
[82] HL Deb 15 June 2005, c1217.
[83] Available at http://www.wales.gov.uk/assemblydata/N0000000000000000000000000032911.pdf.
[84] HL Deb 15 June 2005, c1210.
[85] Available at http://www.wales.gov.uk/assemblydata/N0000000000000000000000000032911.pdf.
[86] Available at http://www.wales.gov.uk/assemblydata/N0000000000000000000000000032911.pdf.
[87] HL Deb 15 June 2005, c1216.

In the Welsh Grand Committee debate on 23 June 2005 Mr Wiggin stated that the Conservative Party's policy was that there should be a "preferendum," which would include an option to abolish the Assembly.[88] Mr Opik added that if there were to be a referendum, it should include full law making and tax raising powers.[89] In Cardiff Mr German argued that by the time the Government proposed to hold a referendum the Assembly would have acquired a "jigsaw of powers, with pieces missing … full legislative powers would only put those missing pieces in place … surely a referendum would not be required."[90]

b. New Standing Orders

Lord Roberts predicted that the Secretary of State's proposal to draw up new standing orders for the Assembly himself would "occasion a rumpus."[91] Indeed, the Assembly's presiding officer, Dafydd Elis-Thomas, stated that "the question of creating an advisory committee answerable to the Secretary of Sate to draft standing orders is an insult to all of us Assembly Members."[92]

c. Electoral system

During the Welsh Grand Committee Debate on 23 June 2005 Mr Hain expressed surprise at "the most excitable frenzy"[93] that had broken out in response to the proposals to ban dual candidacy. This was described by Mr Wiggin as the "most spiteful part of these proposals,"[94] and by David TC Davies as "the Mugabeisation of Welsh politics." Opposition parties at Westminster and Cardiff were opposed to these proposals, as was Mr Elis-Thomas. He said

> this seems to me to be unnecessary and undemocratic, and quite possibly an infringement of candidates' human rights, and I am sure the House of Lords will take a cool view of this proposal.[95]

David TC Davies argued that the PR system should be scrapped in favour of a return to first-past-the-post.[96] Paul Murphy opposed STV, but did support an 80-member Assembly.[97] Mr Llwyd accused Labour backbenchers of approaching the White Paper "first and foremost, [in terms of] the pure electoral advantage in the situation."[98]

---

[88] http://www.publications.parliament.uk/pa/cm200506/cmstand/welshg/st050623/pm/50623s01. c24.

[89] http://www.publications.parliament.uk/pa/cm200506/cmstand/welshg/st050623/pm/50623s01. c23.

[90] Available at http://www.wales.gov.uk/assemblydata/N0000000000000000000000000032911.pdf

[91] HL Deb 15 June 2005, c1211.

[92] http://news.bbc.co.uk/1/hi/wales/4624737.stm. This was in a lecture delivered at the University of Wales, Aberystwyth, on 27 June 2005. John Marek, the Deputy Presiding Officer, also branded these proposals "an insult." *Western Mail*, 16 June 2005.

[93] http://www.publications.parliament.uk/pa/cm200506/cmstand/welshg/st050623/pm/50623s01.htm. c7.

[94] HC Deb 15 June 2005, c265.

[95] http://news.bbc.co.uk/1/hi/wales/4624737.stm. See also *Western Mail,* 28 June 2005.

[96] http://www.publications.parliament.uk/pa/cm200506/cmstand/welshg/st050623/pm/50623s01.htm.

[97] http://www.publications.parliament.uk/pa/cm200506/cmstand/welshg/st050623/pm/50623s01.htm. col 27.

[98] http://www.publications.parliament.uk/pa/cm200506/cmstand/welshg/st050623/pm/50623s01.htm. c30.

3. NAW Committee

The National Assembly for Wales established a "Committee on the Better Governance for Wales White Paper," which reported in September 2005:[99]

http://www.wales.gov.uk/keypubassembettergov/content/reports-e.htm

The Committee's terms of reference were restricted to the first two ideas in the White Paper, the new structure for the NAW and the changes to its legislative powers. It did not consider the changes to the electoral system. The discussion that follows concentrates on those parts of the Committee's report which relate primarily to the Bill, while some of the Committee's comments on the internal processes of the Assembly are left aside.

a. Separation of legislature and executive

The Committee welcomed the proposal to separate the legislature and the executive:[100]

> The creation of legally separate Legislature and Government had the full support of almost all our witnesses. The corporate body model, with its jumbling together of functions which most constitutions keep separate, was misconceived and confusing. Governments and Parliaments perform different tasks, and people simply do not understand the hybrid model which the 1998 Act created. As Professor McAllister put it, "clarity and accountability are always the watchwords of good governance and democratic accountability". The Auditor General told us that separation "should strengthen considerably the arrangements for financial management and accountability in the devolved Welsh public sector". We therefore agree with the White Paper that the corporate body model of the Government of Wales Act 1998 has had "undesirable consequences and limitations", and we welcome the proposal for its demise.

The Committee hoped that "the end of the corporate body should not mean the introduction of a more confrontational style of politics."[101]

b. Ministers

The Committee went on to consider ministerial accountability. Under the present system, Ministers are delegates of the Assembly, the First Minister can be removed automatically by a motion of no confidence, and the budget has to be approved by plenary. The Committee was anxious that the new executive, separated from the legislature, should not become unaccountable. To this end, it pointed to the Resolutions of the two Houses of the UK Parliament in 1997 on ministerial accountability:[102]

---

[99] The Committee's website also contains the minutes of evidence and other papers: http://www.wales.gov.uk/keypubassembettergov/index-e.htm.

[100] Para 7.

[101] Para 8.

[102] HC Deb 19 March 1997, cc1046-47, HL Deb 20 March 1997, c1057.

> That, in the opinion of this House, the following principles should govern the conduct of Ministers of the Crown in relation to Parliament:
>
> (1) Ministers have a duty to Parliament to account, and be held to account, for the policies, decisions and actions of their Departments and Next Steps Agencies;
>
> (2) It is of paramount importance that Ministers give accurate and truthful information to Parliament, correcting any inadvertent error at the earliest opportunity. Ministers who knowingly mislead Parliament will be expected to offer their resignation to the Prime Minister;
>
> (3) Ministers should be as open as possible with Parliament, refusing to provide information only when disclosure would not be in the public interest, which should be decided in accordance with relevant statute and the Government's Code of Practice on Access to Government Information (Second Edition, January 1997);
>
> (4) Similarly, Ministers should require civil servants who give evidence before Parliamentary Committees on their behalf and under their directions to be as helpful as possible in providing accurate, truthful and full information in accordance with the duties and responsibilities of civil servants as set out in the Civil Service Code (January 1996).

The NAW Committee recommended that there should be a clear statement of ministerial accountability to the restructured Assembly, for instance through a new standing order along the lines of the motion quoted above, or through a resolution passed as soon as possible after the 2007 Assembly elections.[103] A similar resolution exists in Scotland, which was passed in 2000.[104] Further information is given in Standard Note no 2671 *The Osmotherly Rules.*

In particular, the Committee drew attention to the question of dismissal of Assembly Ministers. It noted the position in Scotland, where the First Minister is obliged to resign if Parliament resolves that it no longer has confidence in the Scottish Executive. Under the *Scotland Act 1998*, sub-sections 45 (2) and (3), if two-thirds of the members of the Scottish Parliament vote that they have no confidence, the Parliament is dissolved and an election held. The NAW Committee said that it believed “these are appropriate powers for the future Assembly, and we so recommend.”[105]

It also recommended that other provisions in the *Scotland Act 1998* be considered for Wales. These included the requirement for parliamentary approval of the appointment of Ministers, and provisions on Ministers’ tenure of office, contained in section 47 of the Act:

> 47 (1) The First Minister may, with the approval of Her Majesty, appoint Ministers from among the members of the Parliament.
>
> (2) The First Minister shall not seek Her Majesty's approval for any appointment under this section without the agreement of the Parliament.

---

[103] Para 10.
[104] Scottish Parliament Official Report, 1 November 2000, cc1197-1240.
[105] Para 13.

> (3) A Minister appointed under this section -
>
> (a) shall hold office at Her Majesty's pleasure,
> (b) may be removed from office by the First Minister,
> (c) may at any time resign and shall do so if the Parliament resolves that the Scottish Executive no longer enjoys the confidence of the Parliament,
> (d) if he resigns, shall cease to hold office immediately, and
> (e) shall cease to hold office if he ceases to be a member of the Parliament otherwise than by virtue of a dissolution.

The Committee supported suggestions in the White Paper for the formalisation of the role of Deputy Ministers, so that they would have an official status and a salary. However, it noted a negative implication, in a small Assembly, of expanding the executive. The larger the number of members in pay of the Government, the smaller the number available to scrutinise. The Committee recommended[106]

> that the maximum number of Ministers and Deputy Ministers should be regulated by the Bill, with the Assembly having the power to vary that number subject to a two-thirds majority in Plenary.

c. Counsel General

The White Paper proposed changes to the legal advice available to the NAW and the executive. It proposed a post of Counsel General, appointed by the First Minister and approved by the Assembly, who would be a member of the Welsh Assembly Government, although not necessarily a member of the Assembly. The Committee approved this idea, but it also recommended that separate "sound legal advice" be available to the legislature, the Presiding Officer, committees and staff.[107]

d. Statutory duties

The existing NAW has a number of statutory duties under the *Government of Wales Act 1998*. The Committee set them out as follows:[108]

> Under the Government of Wales Act 1998, there are a number of statutory duties placed on the Assembly:
>
> to conduct its business giving equality to English and Welsh (section 47);
> to conduct its business with regard to the principle of equality of opportunity (section 48);
> to make a Local Government Scheme and establish a Local Government Partnership Council (section 113);
> to make a voluntary sector scheme (section 114);
> to consult with business (section 115);
> to exercise its functions with regard to the principle of equality of opportunity, and to report annually on this (section 120);

[106] Para 16.
[107] Para 18.
[108] Para 32.

to make a sustainable development scheme and to report on it annually (section 121).

The White Paper suggested that the duties to publish an annual equality report and to make a sustainable development scheme would fall to the executive, as would the responsibilities for partnership or consultation with local government, the voluntary sector and business. However, the Committee recommended that the executive and the new Assembly Commission each be required to follow equal opportunity policies and to report on them annually to the Assembly.

The Committee argued that the obligation to consult business was weaker than the obligations in respect of local government and the voluntary sector. It recommended that the Government give serious consideration to the preference expressed by Business Wales and the Wales TUC for a statutory obligation to set up a Business Partnership Council.[109] It agreed that the obligations in respect of business, local government and the voluntary sector should fall on the executive and not the legislature.[110]

e. Assembly committees

The Committee welcomed the proposal to allow the Assembly to determine its own committee structure, moving away from the prescriptions of the 1998 Act. It noted the widespread support for the removal of Ministers from subject or scrutiny committees, but it noted that it might sometimes be appropriate for a Minister to serve on a committee, and so it did not support a statutory prohibition on such service.

It also noted that this might make it difficult to find enough non-ministerial members from the governing party to form a majority on each committee, producing a constraint on the number of committees that could reasonably operate at the same time. It considered the possibility of allowing the committees to co-opt non-members. While this was not without its own difficulties, the Committee believed "that the Bill should make it possible for a future Assembly to decide to co-opt non-voting members to committees if it wished to do so."[111]

It argued that the committees would need a statutory power to require attendance and the production of documents, and that this should be based on the equivalent provisions in the *Scotland Act 1998*.[112] This should include "a rule in Wales that if a Committee insists on attendance by Government witnesses, then the Government will always send either a Minister or an official."[113]

[109] Para 37.
[110] Para 38.
[111] Para 47.
[112] Para 52.
[113] Para 54.

f. Law making

The Committee set the proposals on law making in a quantitive context:[114]

> Legislation is the core work of a legislature. That cannot be said of the present Assembly. As the Chair of the Business Committee told us "during the First Assembly only 3% of Committee time and 9% of Plenary time was devoted to consideration of legislation. Even these figures disguise the fact that consideration of a draft Order often took the form of a broad debate … consideration of detailed textual amendments was very rare". By contrast the White Paper describes the future role of the Assembly as "primarily legislative".

It found agreement that the present powers of the Assembly were unsatisfactory. They did not represent, in its view and that of its witnesses, a sufficient means of influencing legislation. This position was consistent with that of the White Paper.

At present the Assembly's powers are largely those inherited from the Secretary of State. These were designed to be exercised as part of Cabinet Government for the UK; they were not a package for running Wales. The Committee considered that the test for the new powers proposed in the White Paper was whether they were sufficient in practical terms to make a difference, not whether they fitted a particular in principle description (eg, "primary powers").

g. Stage 1: framework legislation

The Committee welcomed the intention in Stage 1 to frame UK Bills in such a way as to allow the NAW greater latitude to determine how to implement the details in Wales. It regarded this as "in effect, what was hoped would happen when the 1998 Act was passed."[115] However, it pointed out that there was reluctance at Westminster and in Whitehall to delegate as much power as it would like, largely as a matter of culture and principle. It felt that for Stage 1 to work, there would have to be a change in attitudes, and that this might be helped by stressing that, in the Assembly,[116]

> these powers would be subject to a form of scrutiny in Plenary and Committees way above the perfunctory level of scrutiny to which secondary legislation is subject in the House of Commons.

This point reflected the comment in the White Paper that[117]

> the Assembly is a democratically elected body, with checks and balances built into it through its robust legislative procedures – quite different in nature from an individual Secretary of State.

---

[114] Para 56.
[115] Para 61.
[116] Para 60.
[117] *Better Governance for Wales*, Cm 6582, June 2005, para 3.5.

The Committee added two riders.

It argued that there should be scrutiny of the extent to which the Stage 1 approach is implemented, and that this could be carried out by the Assembly subject committees to which bills are submitted, in liaison with the Welsh Affairs Committee in the House of Commons.

It also argued that, after 2007 and the separation between legislature and executive, the argument that secondary legislation is subject to greater scrutiny in the NAW than in the Houses of Parliament "falls away."[118] It went on, "it would be preposterous for Welsh Ministers to have *more* powers to make secondary legislation than their Whitehall equivalents."

The Committee made the following recommendations for Stage 1:[119]

> Where the Assembly has already been given powers which are more extensive than Whitehall Ministers, those powers should, post 2007, reside with the Assembly as a whole, rather than the Welsh Ministers. These framework powers should be implemented by Assembly Measure, a process which we will describe when we discuss Stage 2. We do not underestimate the difficulties in drafting the forthcoming Wales Bill which this will cause, but we recommend that any secondary legislative power which has been given to the Assembly since 1999 or which will be given by primary legislation from now on should, if that power is more extensive than powers given to Whitehall Ministers, only be exercisable by Assembly Measure after 2007, and that Standing Orders ensure effective scrutiny of any powers directly vested in Assembly Ministers by Westminster.

h. Stage 2: enhanced legislative powers

The Committee acknowledged a spread of opinion as to whether Stage 2 was necessary or desirable, but it declined to express a view. Instead it looked at various points of detail in the working of Stage 2.

There was a proposal in paragraph 3.18 of the White Paper that no Order in Council conferring Stage 2 powers could cover the whole of the devolved field in question. The Committee said that there was "mystery" surrounding this proposal, especially since one Order could be made to cover a proportion of a devolved field, and another could be made to cover the rest. In particular, it felt that special provision might be made for the Welsh language, since this was a devolved field over the whole of which Stage 2 powers might conceivably be granted without prejudice to any reserved interest.[120] The Committee called for clarification of this proposal.[121]

---

118 Para 68.
119 Para 69.
120 Para 76.
121 Para 75.

The Committee also called for clarification over which fields could be covered by Stage 2 Orders in Council. The White Paper referred to those in which the Assembly "currently exercises functions."[122] The Committee questioned what "currently" meant, whether it referred to the date of the White Paper, the date of prospective Royal Assent for the Bill, or the date of a future Stage 2 Order. In particular, it called for clarification in respect of fields "which might in future be transferred from London to Cardiff."[123]

The Committee drew attention to doubts among many witnesses over the power of the Secretary of State to refuse a request for a Stage 2 Order. The Assembly would make a request, but the Secretary of State would not be under an obligation to put it to the UK Parliament. Some witnesses argued that this could prove difficult if a party had campaigned at an election on its intention to make such a request, and the request had been endorsed by the electorate.[124] The Committee did not make a recommendation on this, but it said,[125]

> it would be foolish to pretend that the new system does not have a number of rocks which will need to be steered around deftly, but this would be helped by greater clarity as to the circumstances in which the Secretary of State might decide not to accede to an Assembly request. This may be something which the Welsh Affairs Committee will wish to pursue.

The Committee weighed up the arguments on scrutiny of the Orders in Council at Westminster. While acknowledging the right of Parliament to decide what scrutiny to employ, it was "concerned that there should not be over-scrutiny of the Orders in Council,"[126] since this might, for instance, result in unnecessary delays.

The legislative process in the Assembly for a measure made under an Order in Council was not discussed at length in the White Paper. However, the Committee felt that a process ought to be stipulated, especially since, whatever process were used, its success would have relevance to any future grant of primary powers:[127]

> We recommend that the Bill requires three minimum stages for Measures: a debate on the principle; consideration of detail, with the possibility of hearing witnesses; and a vote on the final Measure.

i. Stage 3: primary legislative powers

The Committee made relatively few comments on Stage 3, the transfer of primary powers over all devolved fields. It noted the view of some witnesses, including the Welsh Conservatives, that Stage 3 should follow Stage 1, and the view of others that there was a need for greater clarity over terms such as "primary powers" and "devolved fields." It picked out the evidence of Professor Keith Patchett, who

---

[122] *Better Governance for Wales*, Cm 6582, June 2005, para 1.25.
[123] Para 77.
[124] Para 89.
[125] Para 90.
[126] Para 93.
[127] Para 97.

also asked some pertinent questions. We paraphrase them below:

> will an extended and detailed list of enactments protected from modification, and of reserved matters, be included in the Bill?
>
> if not, will this be done later by Order or by primary legislation?
>
> if by Order, why would Parliament allow these matters to be decided by Order for Wales when they were contained in the Scotland Bill?
>
> how will it be possible for a referendum to be held without this detail?
>
> how is a list drawn up now which will be relevant in, perhaps, ten years' time when a referendum is held?
>
> will discussions of these areas bog down the parliamentary passage of the Bill?

More detail of what is envisaged for the legislation for Stage 3 would be helpful.[128]

j. Legal personality

Once the NAW is no longer a body corporate there will be a need to create a new legal personality to act on behalf of the Assembly, for instance in contracts and title to property. The Committee was attracted to the model of the Scottish Parliamentary Corporate Body, and it recommended that the *Scotland Act 1998* be followed as closely as possible in establishing a National Assembly Commission.[129] It recommended that financial scrutiny of the new Commission be based on the Commonwealth Principles on the administration and financing of Parliaments, which it set out in an Annex to its Report.[130]

k. Standing Orders

The Committee welcomed the proposal in the White Paper to "provide for a lighter statutory regime for Standing Orders," giving the NAW greater freedom to develop its own procedures. However, it noted no support among witnesses for the suggestion in the White Paper that the Secretary of State should have the power to create a new set of Standing Orders.[131] It appeared that the Government had offered clarification of this proposal:[132]

128 Para 103.

129 Para 21, referring to section 21 of, and Schedule 2 to, the 1998 Act.

130 Annex A, starting at p62 of the Report document.

131 *Better Governance for Wales*, Cm 6582, June 2005, para 3.31.

132 Paras 129-30.

> The Chair of the Business Committee recognised that there might be a need for a backstop position if the Business Committee failed to agree on the new Standing Orders. She suggested that this might be the party leaders and, only if they failed to agree, the arrangements proposed by the Secretary of State. The First Minister's evidence suggested that this was the position to which the Secretary of State was now moving, rather than the position in the White Paper. He told us that the "Secretary of State has been quite clear that he does not want the job of drawing up the Assembly's Standing Orders, but he may need to be involved in resolving any stalemate which may arise", and he also told us that "we all accept that in principle it is better for the Assembly to do it than the Secretary of State". We agree with this. The Assembly is a mature institution which can regulate its own procedure. It would be absurd for outsiders to do so.
>
> We are confident that Members will be able to come together to write a set of Standing Orders which will govern our proceedings in the new Assembly. The Bill may need to contain default powers to allow the imposition of Standing Orders if no agreement can be achieved – we cannot have an Assembly elected in 2007 without Standing Orders – but we are confident that these default powers will not need to be invoked. If they were invoked, it would do nothing for the credibility of our institution. We recommend that the Bill contain only default powers to allow the imposition of Standing Orders in areas where the Assembly has not been able to agree.

l. Name of executive

The Committee acknowledged that there were differing views on the most appropriate name for the new executive. It proposed that the Bill allow the Welsh Assembly Government to change its own name in future should a consensus emerge.[133]

m. Freedom of debate

The Committee recommended that the new legislature should retain the Assembly's power, under Section 33 of the *Government of Wales Act 1998*, to debate matters not falling strictly within its devolved responsibilities.[134]

n. Additional proposals

Finally, the Committee recommended that the Bill should "forge closer links between the Ombudsman and the Assembly," that the Children's Commissioner for Wales should be appointed and financed in the same way as the Auditor General and the Public Services Ombudsman,[135] that proposals for an enhanced standards regime for the Assembly should be taken forward, and that the Bill should remove the present requirement that the Presiding Officer and Deputy Presiding Officer must come from different parties, subject to the proviso that the election of officers from the same party would require a two-thirds majority.[136]

---

[133] Para 20.
[134] Paras 39-43.
[135] For further detail on the *Public Services (Ombudsman) Wales Bill* see Research Paper 05/26.
[136] Paras 134, 135, 136 and 138.

4. Welsh Affairs Committee

A few days after the publication of the Bill the House of Commons Welsh Affairs Committee published its report, *Government White Paper: Better Governance for Wales*.[137] This did not take account of the Bill itself, but it provides extensive relevant opinion. Readers are referred to the report for a full account:

http://www.publications.parliament.uk/pa/cm/cmwelaf.htm#reports

The Committee did not reach consensus on the electoral proposals of the White Paper, and there was also opposition from Conservative members to the referendum provisions.

III The Bill

The Bill was introduced in the House of Commons on 8 December 2005 as Bill 100 of 2005-06. It was accompanied by Explanatory Notes,[138] to which readers are referred for an authoritative account of the Bill:

http://pubs1.tso.parliament.uk/pa/cm200506/cmbills/100/en/06100x--.htm

The Bill is divided into six parts, covering 165 clauses, and it has 12 schedules.

The separation of the legislature and the executive is effected under Parts 1, 2 and 5. **Part 1** deals with the National Assembly for Wales, covering matters such as elections to the Assembly, committees, and the Assembly administration. This part includes provision for the new Assembly Commission and for Standing Orders. More detail on these and other points is given below. **Part 2** covers the Welsh Assembly Government. **Part 5** covers finance and the establishment of a new Welsh Consolidated Fund.

The changes to law making powers are provided for in Parts 3 and 4. Stage 1, framework powers, can be effected as a matter of policy without changes to existing legislation. As a result, it is not provided for in the Bill. Stage 2, enhanced legislative powers, is provided for in **Part 3** of the Bill. Stage 3, primary powers, is provided for in **Part 4** of the Bill. This Part includes provision for a referendum, and Assembly and parliamentary approval, before the introduction of primary powers could occur.

Changes to the electoral system to prevent candidates standing in both constituency and regional list elections are in **Part 1**.

Part 6 of the Bill covers miscellaneous and supplementary provisions.

---

[137] First report 2005-06, HC 551.
[138] Bill 100-EN 2005-06.

The Bill repeals most of the *Government of Wales Act 1998*. However, it does not repeal the whole of that Act. The main provisions of the 1998 Act which will remain in force are those concerning Welsh Public Bodies.[139] Repeals and revocations are listed in Schedule 12 to the Bill. According to Mr Hain,[140]

> there is an existing Government of Wales Act 1998 but, as my memorandum makes clear, around 120 of the clauses in the new Bill - to become an Act, we hope - will be transposing and modifying the existing legislation. There will be around 40 new clauses, mainly dealing with the enhanced powers and the reforms there. Rather than cross-referencing the whole time, the Parliamentary Council advised us it is better to have a single piece of legislation which would be, as it were, the Bible for devolution.

A. Separation of legislature and executive

1. National Assembly for Wales

Much of Part 1, on the National Assembly for Wales, reenacts provisions from the 1998 Act. However, there are some important changes. Some of these relate to the electoral system (see later), while others are a result of the new separation of powers and the end of the body corporate status for the Assembly itself. In particular, Part 1 includes the establishment of the new Assembly Commission, the creation of new standing orders by the Secretary of State, and the committees and their powers.

Clause 1 provides for a National Assembly for Wales, or Cynulliad Cenedlaethol Cymru. Because of this, the National Assembly for Wales set up by the *Government of Wales Act 1998*, with its body corporate status, will cease to exist.

The new National Assembly for Wales will consist of one member for each Assembly constituency, and others for each Assembly electoral region, as at present. The electoral system is discussed in Part C, below.

a. Remuneration

Clauses 20 - 22 cover remuneration of Assembly members. This includes salaries, pensions and other allowances. Broadly speaking, the Assembly may pay whatever level of salary it wishes, and it will decide what allowances to pay. It may pass responsibility for this, and for the administration of a pension scheme, to the new Assembly Commission. Salaries are reduced for those who are also MPs or MEPs, though not for those who are members of the House of Lords.

---

[139] See Sections 27 and 28, 104 and 105, and 126 to 150 of the 1998 Act, although see Schedule 12 to the present Bill for the detail on sub-sections.

[140] Welsh Affairs Committee, *Government White Paper: Better Governance for Wales*, 1st Report 2005-06, HC 551, Minutes of Evidence, Ev 63.

Under **Clause 20** the Assembly must provide for members' salaries,[141] and it may also provide for allowances, pensions and gratuities.[142] In particular, the Assembly may provide for contributions towards pensions for former members, or for former Assembly office holders,[143] and it may provide for a pension scheme.[144]

Payments in respect of current or former Presiding Officers or Deputy Presiding Officers are charged on the Welsh Consolidated Fund.[145] According to the Explanatory Notes, this entails that they "will not need to be authorised annually by the Assembly."

Under **Clause 21** the Assembly must ensure that a member's salary is reduced if another salary is payable to him/her as an MP or an MEP.[146] This reduction must be specified[147] and, as with full salaries and pensions, it may be made by standing order, resolution or Assembly Measure. Functions in this regard may be conferred on the Assembly Commission.[148]

Clause 22 makes some additional detailed provisions on salaries and pensions. In particular it requires that information be published on the amounts paid to each member as salary and allowances and on the total amount paid to members as a whole.[149] It requires that if the Assembly Commission has taken on the function of setting salaries, allowances, gratuities and pensions, then it must publish the totals, and it must publicise the levels of remuneration which it sets as soon as practicable.[150]

b. Oath of Allegiance

Clause 23 covers the Oath of Allegiance. Assembly members must take the Oath, or make the corresponding affirmation, as set out in section 2 of the *Promissory Oaths Act 1868*,[151] and they may not take part in proceedings, other than to elect the Presiding Officer or Deputy Presiding Officer, before doing so.[152] They are not paid until they have taken the Oath or made the affirmation, although they receive backpay thereafter. If they do not swear in within two months of election, or longer if the Assembly so decides, they cease to be members and their seats become vacant.

---

[141] Clause 20 (1).
[142] Clause 20 (2) and (3).
[143] Eg, Presiding Officer, Deputy Presiding Officer or others as determined by the Assembly.
[144] Clause 20 (4).
[145] Clause 20 (5).
[146] Clause 21 (1).
[147] Clause 21 (2).
[148] Clause 21 (3).
[149] Clause 22 (2).
[150] Clause 22 (2) and (3).
[151] Clause 23 (1).
[152] Clause 23 (4).

c. Payments to political groups

Clause 24 makes provision for an NAW equivalent of Short money. The Assembly will determine amounts to be paid to political groups, and the conditions for payment, on a two-thirds majority of members voting.[153] The money will be paid by the Assembly Commission, and it must be "for the purpose of assisting Assembly members who belong to those political groups to perform their functions as Assembly members."[154] Assembly standing orders may determine a minimum number of members needed for a political group to exist.[155] The sums payable and the amounts paid must be published, the latter on an annual basis.[156]

d. Presiding Officer

Clause 25 provides for a Presiding Officer and Deputy Presiding Officer. These are elected from among the Assembly members at their first meeting after a general election.[157] These two postholders must not belong to the same political group, nor to different groups both of which have Ministers in the executive (ie in a coalition government), unless the Assembly waives this rule on a two-thirds majority.[158]

Clauses 25 and 26 (the latter establishes the post of Clerk) closely follow Sections 19 and 20 of the *Scotland Act 1998*. The Scottish Parliament has encountered some inflexibility in having the number of Deputies (two in its case, compared to one for Wales) set in statute.

The functions of the Presiding Officer and his/her Deputy are listed in a table in the Explanatory Notes.[159] They are broadly those of a parliamentary speaker, within the Assembly context, but they include some significant additional responsibilities. These include fixing the date of a constituency by-election, designating an acting First Minister if needed, and recommending the Assembly's choice of First Minister to the Queen.

e. Commission

Clause 27 establishes the National Assembly for Wales Commission, or Comisiwn Cynulliad Cenedlaethol Cymru. This is a body corporate.[160] Its members are the Presiding Officer and four other Assembly members.[161] The overarching function of the Commission is set out in Clause 27 (4):

---

[153] Clause 24 (1), (2) and (4).
[154] Clause 24 (1).
[155] Clause 24 (5) (a).
[156] Clause 24 (6).
[157] Clause 25 (1).
[158] Clause 25 (7) and (9).
[159] Para 112.
[160] Clause 27 (1).
[161] Clause 27 (2).

> The Assembly Commission must –
>
> (a) provide to the Assembly, or
> (b) ensure that the Assembly is provided with,
>
> the property, staff and services required for the Assembly's purposes.

The Commission is modelled after those in Scotland and the UK, and the Bill closely follows Section 21 of the *Scotland Act 1998*. As noted above, the Commission is necessary because the new Assembly is not a body corporate itself. As a result, some other legal personality is needed to employ staff, enter contracts and hold property. This is what the Commission will do.

Various detailed functions are conferred on the Assembly Commission by other parts of the Bill, or may be conferred by the Assembly. Notably, under **Clause 41 (1)** the Commission represents the Assembly in legal proceedings. However, the main details on the Commission are given in **Schedule 2**.

The Commission is chaired by the Presiding Officer, a role that cannot be delegated to the Deputy Presiding Officer.[162] Instead, the Commission appoints one of its other members to deputise in that role.

The Commission may acquire, hold and dispose of property.[163] It may also appoint staff, including the Clerk of the Assembly.[164] These people are not civil servants, but their recruitment and their terms and conditions of employment must be "broadly in line" with those applying to the staff of the Welsh Assembly Government.[165] The staff may be treated as Crown servants for the purposes of specific enactments if an Order in Council so provides.[166] The Explanatory Notes give an example from Scotland, where employment by the Scottish Parliamentary Corporate Body is treated as Crown employment for the purposes of certain provisions of the *Data Protection Act 1998*. The Commission pays the salaries of these staff, and it also deals with their pensions,[167] which may be brought under the Principal Civil Service Pension Scheme.[168]

The Commission may enter into contracts, charge for goods or services, invest money and accept gifts.[169] It may borrow money but only under the following terms:[170]

---

[162] Schedule 2, para 11.
[163] Schedule 2, para 2.
[164] Schedule 2, para 3. The Clerk is in Clause 26.
[165] Schedule 2, para 3 (3) and (4).
[166] Schedule 2, para 12 (2) (a).
[167] Schedule 2, para 3 (5) to (9).
[168] Schedule 2, para 3 (8). The Explanatory Notes cite paragraph 7, but this appears to be a typing error.
[169] Schedule 2, para 4.
[170] Schedule 2, para 4 (5).

> The Assembly Commission may borrow sums in sterling by way of overdraft or otherwise for the purpose of meeting a temporary excess of expenditure over sums otherwise available to meet expenditure,

and then only with the approval of the Assembly itself.[171]

The Commission may promote public awareness of the electoral system and the system of devolved government.[172] This may be done in any manner it chooses, and the Schedule mentions in particular carrying out public education or information campaigns, and funding others to do the same. The Commission may provide funding to the Electoral Commission for the same purposes.[173]

The Commission is given the responsibility of undertaking its functions in accordance with three principles: equality of opportunity, sustainable development and, as far as practicable, the equality of the English and Welsh languages.[174] The exact wording is as follows:

> 8 (1) The Assembly Commission must make appropriate arrangements with a view to securing that its functions are exercised with due regard to the principle that there should be equality of opportunity for all people.
>
> (2) In the exercise of the functions of the Assembly Commission due regard must be had to the principle of promoting sustainable development.
>
> (3) In the exercise of the functions of the Assembly Commission effect must be given, so far as is both appropriate in the circumstances and reasonably practicable, to the principle that the English and Welsh languages should be treated on a basis of equality.

f. Committees

The Government commented in the White Paper that the provisions on committees in the *Government of Wales Act 1998* were "significantly more prescriptive" than those in the *Scotland Act 1998*.[175] It proposed to remove the bulk of the prescriptions as to which committees must be set up (with the exception of the Audit Committee). As a result, the choice of which committees to set up will be for the Assembly through standing orders. However, the Bill makes a number of stipulations with which the standing orders will have to comply. These are set out in **Clauses 28 to 30**.

---

[171] Schedule 2, para 4 (6) (b).
[172] Schedule 2, para 5.
[173] Schedule 2, para 6.
[174] Schedule 2, para 8.
[175] Cm 6582, para 2.14 – 2.16.

Committees and sub-committees may not include anyone who is not an Assembly member (though see the comments about the Secretary of State, below).[176] This is in contrast to the hope expressed in the NAW Committee report that non-voting non-members might be coopted to overcome the possible shortage of members available to committees.

The membership of the committees must reflect the representation of political groups in the Assembly, and provisions for achieving this are set out in detail in the Bill.[177] **Clause 29** applies a d'Hondt formula for this purpose, an explanation of which is given in the Explanatory Notes at paragraphs 132 to 137. A similar formula is used in Section 29 of the *Northern Ireland Act 1998* to allocate committee chairs and deputy chairs. There is no such formal requirement in the *Scotland Act 1998*, the matter being left to standing orders. The use of a d'Hondt formula is one way in which the Bill is more prescriptive than the *Government of Wales Act 1998*.

There must be an Audit Committee, or Pwyllgor Archwilio.[178] This must be chaired by a member who does not belong to a governing party, and the committee must not include Ministers nor the Counsel General. There is no explicit provision for Regional Committees, unlike in the *Government of Wales Act 1998*.

g. Standing orders

Clause 31 deals with the standing orders of the Assembly. It sets out various matters that must or may be included in the standing orders, including a sub judice rule, provision for excluding members from proceedings or withdrawing their rights and privileges, holding proceedings in public except in circumstances set out in the standing orders, and the reporting of proceedings.

There are various other matters which must or may be covered by standing orders, which are stated at points throughout the Bill. The Explanatory Notes provide a table of these in its paragraphs 143 to 144.

The existing standing orders of the Assembly will be replaced once the new Assembly comes into being. Under **Schedule 11** the Secretary of State will make the new standing orders.[179] This was a prospect that caused some controversy at the time of the White Paper. Under the present Bill, the Secretary of State must make the standing orders by 31 March 2007, in time for the opening of the new Assembly after the 2007 elections.[180] He must be guided by the provisions in the Bill, but also he must give effect to any relevant proposals passed by the existing Assembly on a two-thirds vote.[181] He may modify the Assembly's proposals either to make them more effective or to make them internally consistent.[182]

---

[176] Clause 28 (2).
[177] Clause 29.
[178] Clause 30.
[179] Schedule 11, para 18.
[180] Schedule 11, para 18 (1).
[181] Schedule 11, para 18 (2), (3) and (4).
[182] Schedule 11, para 18 (5).

The standing orders may be changed by the Assembly on a two-thirds vote, although the provisions in the Bill for matters that must be covered would remain and would have to be complied with.

h. Relations with UK Government

Under **Clause 32** the Secretary of State is entitled to participate in the proceedings of the Assembly, but s/he is not entitled to vote. Standing orders may provide for the Secretary of State to participate in committee proceedings, or for other UK Ministers or civil servants to participate in proceedings of the Assembly.[183]

Under **Clause 33** the Secretary of State must consult with the Assembly about the UK Government's legislative programme as soon as possible after the beginning of each parliamentary session. The purpose of this is to achieve for the Assembly something similar to the Queen's Speech and accompanying debate. The Secretary of State must participate at least once in a plenary debate in the Assembly on the legislative programme.[184] S/he is not obliged to consult on legislative proposals if "there are considerations relating to the bill that make such consultation inappropriate."[185]

i. Equality

The Assembly has its own equality responsibilities, under **Clause 35**:

> (1) The Assembly must, in the conduct of Assembly proceedings, give effect, so far as is both appropriate in the circumstances and reasonably practicable, to the principle that the English and Welsh languages should be treated on a basis of equality.
>
> (2) The Assembly must make appropriate arrangements with a view to securing that Assembly proceedings are conducted with due regard to the principle that there should be equality of opportunity for all people.

j. Members' interests

Clause 36 sets out a statutory provision for the register of members' interests and also specifies that the standing orders include provision for the differing roles and responsibilities of constituency members and regional members (see next section). This is a significant extension of current practice.

The *Government of Wales Act 1998* provided for a scheme of registration and declaration of interests of members. Failure to register or to declare interests is treated as a criminal offence. The consent of the DPP is required before prosecution. Background on the current regime applicable in Wales is given in a book by the Study of

---

[183] Clause 32 (3).
[184] Clause 33 (2).
[185] Clause 33 (5).

Parliament Group in 2004.[186] As in the House of Commons, paid advocacy is prohibited, and members must declare financial interests before taking part in proceedings and register (mainly financial) interests in a publicly-available register.

The Assembly appointed an independent adviser on standards on 15 March 2000 to investigate allegations against Assembly members. The Assembly has recently restructured the role, following recommendations from Professor Diana Woodhouse to the Assembly Standards Committee in 2002.[187] The current adviser, Richard Penn, was appointed as Commissioner for Standards in 2005. The Woodhouse review recommended that the Assembly create a statutory underpinning for the Commissioner post when legislative time at Westminster was available. The Bill is silent on the existence or otherwise of a Commissioner, but there is provision for the Assembly to make a measure under part 3 of the Bill at a future date relating to registration of interests.[188]

Clause 36 re-enacts the bulk of the provisions of the 1998 Act in relation to the registration and declaration of interests, without significant amendment, apart from the guidance on roles discussed below. The Woodhouse report had recommended an amendment to the 1998 Act to allow members a defence to the offence of failing to register or declare an interest.

k. Role of constituency and regional members

Clause 36 also requires the standing orders of the Assembly to address the question of the differing roles of constituency and regional members, whether in the orders directly, or in a code. It states:

> (6) The standing orders must include provision about (or for the making of a code or protocol about) the different roles and responsibilities of Assembly constituency members and Assembly regional members; and—
>
> (a) Assembly constituency members must not describe themselves in a manner which suggests that they are Assembly regional members, and
>
> (b) Assembly regional members must not describe themselves in a manner which suggests that they are Assembly constituency members.

The precedent would appear to be the *Code of Conduct for Members of the Scottish Parliament*,[189] which contains an annexe (Annexe 5) requiring MSPs to adhere to certain principles as follows:

[186] *Conduct Unbecoming:The Regulation of Parliamentary Behaviour* ed Oonagh Gay and Patricia Leopold 2004

[187] *Review of the Standards of Conduct Regime of the National Assembly for Wales* Report for Committee on Standards of Conduct October 2002

[188] *Government of Wales Bill, Explanatory Notes, Bill 100-EN,* para 162

[189] The full code can be found at http://www.scottish.parliament.uk/msp/conduct/coc.pdf

> I [There are] one constituency MSP and seven list MSPs who are elected in the wider region. All eight MSPs have a duty to be accessible to the people of the areas for which they have been elected to serve and to represent their interests conscientiously.
>
> II The wishes of constituents and/or the interests of a constituency or locality are of paramount importance.
>
> III All MSPs have equal formal and legal status.
>
> IV MSPs should not misrepresent the basis on which they are elected or the area they serve.
>
> V No MSP should deal with a matter relating to a constituent, constituency case or constituency issue outwith his or her constituency or region (as the case may be), unless by prior agreement.[190]

There follows guidance on how the principles should be interpreted. The Code and Annexe are not statutory, but came into effect on 24 February 2000, under Rule 1.6 of the Standing Orders in operation in 1999. However, there is a statutory Standards Commissioner under an Act of the Scottish Parliament in 2002 and there is a Bill currently passing through Holyrood to create a statutory system of regulating members' Interests.[191] If passed, this will require a re-drafting of the Code.

The Annexe was published following an acrimonious debate in June 1999 over the allocation of allowances to MSPs, which resulted in a lower level being available to regional MSPs, who would not carry the same burden of constituency work. The first regional member elected for each party in a region receives the same allowances as a constituency MSP, but every further regional member of that party elected in the same region receives a lower level of allowances.[192] The Presiding Officer set up a working party under the then Deputy Presiding Officer, George Reid, which reported in July 1999. The Standards and Public Appointments Committee of the Parliament is responsible for adjudicating on complaints of breaches of the Code, and receives reports to that effect from its statutory Parliamentary Standards Commissioner. There have been a number of cases which have involved allegations against regional members for "poaching" constituency work.[193] The system is described in greater detail in an ESRC report by Dr Jonathan Bradbury, which also presents the views of MSPs and AMs as to the value of such parliamentary guidance.[194]

---

[190] For full details see 'Relationships between MPS:guidance from the Presiding Officer Annexe 5 *Code of Conduct*

[191] *Scottish Parliamentary Standards Commissioner Act 2002;Registration of Members' Interests Bill* introduced September 2005

[192] Details are contained under Members' Support Allowance at http://www.scottish.parliament.uk/msp/MSPAllowances/index.htm#anna

[193] See for example 10th report 2002 *Report on complaint against Christine Grahame*, a regional member, at http://www.scottish.parliament.uk/business/committees/historic/standards/reports-02/str02-10-01.htm

[194] *Local Representation in a Devolved Scotland and Wales: Guidance for Constituency and Regional Members: Lessons from the First Term* Jonathan Bradbury et al ESRC 2003

No guidance was issued in the Assembly at its foundation in 1999, where the Presiding Officer, Dayfdd Elis Thomas, took the view that all members were equal, and there are no differences in the level of allowances payable to constituency and regional members in Wales.[195] However, there have been significant tensions between the two types of members, documented in the Bradbury study. A research report for the Arbuthnott Commission, set up in 2004 to consider the effects of non-coterminous parliamentary boundaries in Scotland, indicated that while tensions had declined in Scotland during the second term, antagonism appeared to have increased in Wales.[196] The report for the Arbuthnott Commission cast doubt on the value of more regulatory guidance for MSPs, noting that strengthening existing guidance might "re-awaken anger on this issue which has started to subside."[197]

The Bill requires guidance to be issued by the Assembly, but does not stipulate the content of the guidance, nor the way in which it would be policed. Presumably either the Presiding Officer or the Standards Commissioner would have a role in investigating complaints. Failure to adhere to this aspect of standing orders would not be a criminal offence, but there are questions as to whether the proposed guidance would be enforceable or merely declaratory – helping to build conventions to sustain the constituency work of the Assembly members.

It is worth noting that there is no statutory requirement in the Bill for differing levels of allowances for constituency and regional members.

I. Witnesses and documents

Clauses 37 to 40 deal with the Assembly's power, in the absence of any form of parliamentary privilege, to call witnesses and to require them to produce documents. Parliamentary privilege is held solely by the Houses of Parliament. These clauses closely follow Sections 23 to 26 of the *Scotland Act 1998*. The Scottish Executive developed guidance on the appearance of witnesses before committees, which was accepted by the Scottish Parliament in 2000 and which provides an equivalent to the UK Osmotherly Rules.[198] It is feasible that similar guidance might be developed in Wales.

Clause 37 gives the Assembly the power to call witnesses, and to require them to produce documents, concerning matters relevant to the exercise of functions by Welsh Ministers. However, there are a number of exemptions. The Assembly may not place such obligations on a person who is not involved in functions or activities "in relation to Wales,"[199] nor on current judges.[200] It may not place obligations on current or former

[195] See Bradbury et al p13,and see evidence from Dafydd Elis Thomas to the Richard Commission

[196] *The Local Work of Scottish MPs and MSPs: Effects of non-coterminous boundaries and AMS* Jonathan Bradbury and Meg Russell May 2005, available from http://www.arbuthnottcommission.gov.uk/docs/research/Local%20Work%20of%20Scottish%20MPs%20and%20MSPs.pdf

[197] Ibid, Executive Summary

[198] See SN/PC/2671, *The Osmotherly Rules*, which also covers the Scottish rules.

[199] Clause 37 (2).

[200] Clause 37 (4) (a).

Ministers of the Crown and civil servants in respect of official functions.[201] There is also an official functions exemption for former members of courts and tribunals.[202] If the Assembly calls a current or former employee of the Welsh Assembly Government, then a Welsh Minister, the First Minister or the Counsel General can issue a direction, under Clause 37 (6), that someone else should appear instead. There is also a limited exemption in respect of the Counsel General (see below).

Offences for failing to comply are set out in **Clause 39**. Sub-clause 1 reads:

> (1) A person to whom a notice under section 38(1) has been given commits an offence if the person—
>
> (a) refuses or fails without reasonable excuse to attend proceedings as required by the notice,
>
> (b) refuses or fails without reasonable excuse, when attending proceedings as required by the notice, to answer any question concerning the subjects specified in the notice,
>
> (c) refuses or fails without reasonable excuse to produce any document required to be produced by the notice, or
>
> (d) intentionally alters, suppresses, conceals or destroys any such document.

2. Welsh Assembly Government

Under **Clause 45** there is to be a Welsh Assembly Government, or Llywodraeth Cynulliad Cymru. This will include a First Minister, or Prif Weinidog, other Welsh Ministers, or Gweinidogion Cymru, the Counsel General to the Welsh Assembly Government, or Cwnsler Cyffredinol i Lywodreath Cynulliad Cymru, and Deputy Ministers, or Dirprwy Weinidogion Cymru.

There is a limit on the size of the Welsh Assembly Government, since there may be no more than 12 persons holding office as a Minister or Deputy Minister at any time.[203] The staff of the Welsh Assembly Government will be civil servants, as at present.[204]

---

[201] Clause 37 (3).
[202] Clause 37 (4) (b).
[203] Clause 51.
[204] Clause 52.

a. Appointment

The First Minister is nominated by the Assembly from among its members,[205] and is appointed by the Queen.[206] The First Minister appoints the Welsh Ministers and Deputy Ministers from among the Assembly members.[207] S/he also recommends to the Queen, subject to the agreement of the Assembly, an appointment to the post of Counsel General.[208]

In the event of a vote of no confidence by the Assembly, the Ministers and Deputy Ministers must resign.[209] The First Minister is replaced, but first remains in office for a period of up to 28 days, during which the Assembly nominates a First Minister.[210] There is nothing on the face of the Bill to stop the Assembly renominating the outgoing First Minister (if s/he has regained confidence somehow). The Counsel General remains in office until the nomination of First Minister.[211]

b. Counsel General

The Counsel General is the legal adviser to the Welsh Assembly Government, and its representative in the courts. The postholder does not have to be an Assembly member.

Under **Clause 34** the Counsel General may participate in Assembly proceedings, but without a vote (unless s/he happens to be a member). The Counsel General enjoys a limited exemption from the powers of the Assembly to call for documents. S/he may decline to answer a question or to produce a document concerning a particular case if s/he feels that this would be prejudicial to criminal proceedings in that case, or that it would be contrary to the public interest.[212]

c. Remuneration

Under **Clause 53** the salary, allowances, pensions and gratuities of the Welsh Assembly Government will be provided by the Assembly out of the Welsh Consolidated Fund. As with payments to members, the Assembly must publish each financial year the amounts paid to each recipient and the total amount paid.[213] It may pass responsibility for remuneration, and for publishing information about it, to the Assembly Commission.[214]

---

[205] Clause 47.
[206] Clause 46.
[207] Clause 48 and 50.
[208] Clause 49.
[209] Clauses 48 (5) and 50 (5).
[210] Clause 47.
[211] Clause 49 (5).
[212] Clause 34 (3).
[213] Clause 54 (2).
[214] Clause 53 (7).

d. Functions

The initial functions of the Welsh Assembly Government will be transferred from the existing arrangements. This is set out in broad terms in **Clause 58**, and the details are in **Schedule 3** and **Schedule 11, paragraphs 28 to 38**. As a result the Welsh Ministers will exercise their executive functions on a direct statutory basis in future, not as a result of delegation by the Assembly as at present.

While most of the current executive functions will be transferred to the Welsh Assembly Government, Orders in Council may make alternative provision on some specific matters. For instance, a power might be transferred to the First Minister only, or to the Commission. If it is of a predominantly legislative character, it might be passed to the Assembly.

Many of the clauses which follow here are closely modelled on equivalent sections in the *Scotland Act 1998* or the *Government of Wales Act 1998*. The Explanatory Notes draw attention to a new provision in the form of **Clause 60**, which empowers Welsh Ministers to do anything they consider appropriate to achieve the following objectives:[215]

> (a) the promotion or improvement of the economic well-being of Wales,
>
> (b) the promotion or improvement of the social well-being of Wales, and
>
> (c) the promotion or improvement of the environmental well-being of Wales.

This includes the power to do things for the benefit of persons or areas outside Wales, if it would support the objectives listed above.[216]

Clause 59 places an obligation on Welsh Ministers to implement European law, by allowing them to make regulations under the *European Communities Act 1972*. They have power under **Clause 61** to do anything appropriate to promote culture and heritage in Wales, and under **Clause 62** they may make representations on "any matter affecting Wales"**.** **Clause 63** provides that Ministers of the Crown must consult Welsh Ministers before making changes to cross-border bodies. These changes include appointing or removing such a body,[217] appointing or removing its members or office holders (unless they have no functions relevant to Wales),[218] or other activities which might affect Welsh Ministerial responsibilities.[219]

Under **Clause 70** the Welsh Assembly Government may give financial assistance to anyone engaged in activities which it believes will help it to attain its objectives.

---

[215] Clause 60 (1).
[216] Clause 60 (3).
[217] Clause 63 (1) (a).
[218] Clause 63 (1) (b).
[219] Clause 63 (1) (c).

Clause 77 places a responsibility on the Welsh Ministers to exercise their functions with due regard to equality of opportunity. They must publish an annual report on their equal opportunity activities, showing what activities they undertook during the year and assessing their effectiveness.[220]

Under **Clause 78** they must make a scheme to promote sustainable development. They must publish a report on the implementation of the scheme each year,[221] and they must publish an assessment of the effectiveness of the scheme in the year after a general election.[222]

Clause 79 provides that European law is binding on Wales and the Welsh Assembly Government, and that that Government may not legislate in a way that is incompatible with that law.

Clause 80 ties the Welsh Assembly Government to the *Human Rights Act 1998*, by providing that it may not legislate in a way that is incompatible with the *European Convention on Human Rights*.

e. Relationships

The Bill provides for the relationships that the Welsh Assembly Government will have with local authorities, the voluntary sector and business. This is placed under the heading "'inclusive' approach to exercise of functions." These clauses are closely modelled on sections 113 to 115 of the *Government of Wales Act 1998*. The existing Welsh Assembly Government has pursued a "huge range of partnerships" at various levels,[223] including two major umbrella initiatives, the EU Structural Fund partnerships and the Communities First initiative.

Under **Clause 73** the Welsh Ministers must make a scheme to promote local government in Wales. This will be subject to an annual report on implementation,[224] but there is no provision for an assessment of its effectiveness. Under **Clause 72** they must establish a Partnership Council for Wales, or Cyngor Partneriaeth Cymru, which will bring together Ministers, Deputy Ministers and members of local authorities. The Partnership Council may give advice to Welsh Ministers or to those involved in local government in Wales, and it may also make representations on behalf of local government.[225] The Welsh Ministers must take account of advice and representations from the Partnership Council when they draw up the local government scheme.[226]

---

[220] Clause 77 (2).
[221] Clause 78 (6).
[222] Clause 78 (7).
[223] J Osmond, "Nation Building and the Assembly," in A Trench ed, *Has devolution made a difference? The state of the nations 2004*, 2004, pp66-7.
[224] Clause 73 (6).
[225] Clause 72 (4).
[226] Clause 73 (3).

Under **Clause 74** the Welsh Ministers must make a scheme to promote the interests of the voluntary sector (bodies not making a profit *whose activities benefit Wales*). This must be done in consultation with the voluntary sector ("such relevant voluntary organisations as they consider appropriate").[227] The scheme must set out how the Ministers will provide assistance to voluntary organisations, how they will monitor the use made of this assistance, and how they will consult voluntary organisations about exercising functions that affect them.[228]

An annual report must be published on the implementation of the voluntary sector scheme.[229]

Clause 75 sets out the relationship with business. It is terse compared to those for local government and the voluntary sector:

> The Welsh Ministers must carry out consultation with such organisations representative of business and such other organisations as they consider appropriate having regard to the impact of the exercise by the Welsh Ministers of their functions on the interests of business.

B. Law making

As mentioned above, the proposal in the White Paper for broad framework legislation, the first stage in the development of greater capacity for law making in Wales, is not covered in the Bill, because it can be implemented as a matter of policy under existing legislation. The Bill does introduce provisions for the second and third stages, enhanced legislative powers and primary powers.

1. Enhanced legislative powers

In the Bill the terminology relating to Stage 2, which the White Paper called enhanced legislative powers, is "Assembly measures." These are the instruments that the Assembly will pass to make its new laws in devolved fields. They will be made under the terms of the Orders in Council that authorise them. Clauses 92 to 95 cover the general legislative competence available under Assembly measures. Clauses 96 to 101 cover the procedural aspects of passing a measure.

a. Competence

Under **Clause 92** the Assembly may make laws known as Measures of the National Assembly for Wales, or Mesurau Cynulliad Cenedlaethol Cymru. Under **Clause 93** these may make "any provision that could be made by an Act of Parliament,"[230] subject to some exceptions (see below). They will become law after being passed by the

[227] Clause 74 (6).
[228] Clause 74 (4).
[229] Clause 74 (9).
[230] Clause 93 (1).

Assembly and approved by Her Majesty in Council.[231] In addition, the continuing sovereignty and primary power of the UK Parliament is affirmed.[232]

Schedule 5, Part 1, lists the matters on which Assembly measures may be made. They are grouped under "fields" (ie devolved subjects) within which a "matter" may be specified. The list of fields is as follows:

Field 1: agriculture, fisheries, forestry and rural development

Field 2: ancient monuments and historic buildings

Field 3: culture

Field 4: economic development

Field 5: education and training

Field 6: environment

Field 7: fire and rescue services and promotion of fire safety

Field 8: food

Field 9: health and health services

Field 10: highways and transport

Field 11: housing

Field 12: local government

Field 13: National Assembly for Wales

Field 14: public administration

Field 15: social welfare

Field 16: sport and recreation

Field 17: tourism

Field 18: town and country planning

Field 19: water and flood defence

Field 20: Welsh language

[231] Clause 92 (2).
[232] Clause 92 (5).

However, only Field 13, the National Assembly for Wales, contains any specified matters. These are:

Matter 13.1

Creation of, and conferral of functions on, an office or body for and in connection with investigating complaints about the conduct of Assembly members and reporting on the outcome of such investigations to the Assembly.

Matter 13.2

Conferral of functions on the Assembly Commission for and in connection with facilitating the exercise by the Assembly of its functions (including the provision to the Assembly of the property, staff and services required for the Assembly's purposes).

Matter 13.3

Provision for and in connection with the payment of salaries, allowances, pensions and gratuities to or in respect of Assembly members, the First Minister, any Welsh Minister appointed under section 48, the Counsel General and any Deputy Welsh Minister.

Matter 13.4

Provision for and in connection with the creation and maintenance of a register of interests of Assembly members and the Counsel General.

Matter 13.5

Provision about the meaning of Welsh words and phrases in—

(a) Assembly Measures,

(b) subordinate legislation made under Assembly Measures, and

(c) subordinate legislation not so made but made by the Welsh Ministers, the First Minister or the Counsel General.

Matter 13.6

Provision for and in connection with the procedures for dealing with proposed private Assembly Measures, including, in particular—

(a) procedures for hearing the promoters of, and objectors, to proposed private Assembly Measures,

(b) the persons who may represent such promoters and objectors, and the qualifications that such persons must possess,

(c) the imposition of fees for and in connection with the promotion of proposed private Assembly Measures, and

(d) the assessment of costs incurred in connection with proposed private Assembly Measures

As things stand, these are the only matters on which the Assembly would be able to adopt measures if the Bill is passed in its current form.

Under **Clause 94** other matters may be added in future by Orders in Council.[233] Orders may amend the list of fields, including by adding a field,[234] but not in a way that gives competence over a non-devolved field (technically, one in which no functions are exercisable by the Welsh Assembly Government).[235]

Before such an Order is made a draft must be approved by the Assembly and sent to the Secretary of State.[236] S/he must decide within 60 days whether to lay the draft before Parliament or to refuse to do so. In the latter case s/he must give reasons to the First Minister.[237] This power of the Secretary of State to refuse to lay a draft Order attracted criticism, which was reflected in the report of the NAW Committee, as discussed above. If the draft is laid, it must secure approval by a resolution of each House of Parliament before it can be made.[238] If there is doubt that a matter in a draft Order relates to a listed field, it can be referred to the Supreme Court by the Counsel General or the Attorney General for a decision.[239]

The Assembly may not adopt measures extending beyond England and Wales,[240] nor measures that are incompatible with the *European Convention on Human Rights* or European law.[241] Additional restrictions are contained in **Schedule 5, Part 2** (which is itself qualified by Schedule 5, Part 3). These include that a measure cannot remove or modify any function of a UK Minister or of the Comptroller and Auditor General, it cannot create criminal offences subject to punishment above specified levels, it cannot, with some exceptions, modify the rest of the Bill, it cannot modify statutory provisions that require repayment of borrowed money to be charged on the Welsh Consolidated Fund, and it cannot modify the following:

---

[233] Clause 94 (1) (a).
[234] Clause 94 (1) (b).
[235] Clause 94 (2).
[236] Clause 94 (5) and (6).
[237] Clause 94 (7).
[238] Clause 94 (5) (b).
[239] Clause 95. The Supreme Court is not due to come into existence before 2008. It is established under the *Constitutional Reform Act 2005*.
[240] Clause 93 (6) (b).
[241] Clause 93 (6) (c).

TABLE

Enactment	*Provisions protected from modification*
European Communities Act 1972 (c. 68)	The whole Act
Data Protection Act 1998 (c. 29)	The whole Act
Government of Wales Act 1998 (c. 38)	Sections 144(7), 145, 145A and 146A(1)
Human Rights Act 1998 (c. 42)	The whole Act
Civil Contingencies Act 2004 (c. 36)	The whole Act
Re-Use of Public Sector Information Regulations 2005 (S.I. 2005/1505)	The whole set of Regulations

b. Procedure

Much of the procedure concerning Assembly measures falls to the standing orders, but the Bill sets out a framework.

Under **Clause 96** a measure can be introduced by a member of the Welsh Assembly Government (including the Counsel General) or by any other Assembly member. It will then be subject to at least three stages: a debate, with vote, on the general principles, consideration and voting on the details, and a final stage when the measure is passed or rejected.[242] These are set out in **Clause 97**. They are intended to correspond roughly to second reading, committee stage and third reading at Westminster. This three stage approach may be modified for measures that restate the law, that repeal or revoke spent enactments or for private measures.[243] According to the Explanatory Notes there might be a streamlined approach for restatements and repeals, while there might be scope in respect of private measures for individuals affected to make representations.

The Counsel General or the Attorney General may refer a measure to the Supreme Court if there is any doubt that it falls within the Assembly's competence.[244] If the Supreme Court finds that it does not, then the measure can be reconsidered by the Assembly.[245] It can also be reconsidered if the Supreme Court refers the matter to the European Court of Justice and the Assembly chooses to reconsider the measure before the ECJ rules.[246] If it is amended, then there must be a final stage at which it can be approved or rejected in its amended form.[247]

---

[242] Clause 97 (1).
[243] Clause 97 (3).
[244] Clause 98.
[245] Clause 97 (6).
[246] Clause 97 (6).
[247] Clause 97 (7).

Clause 100 gives the Secretary of State power to intervene to block a measure. S/he does this by means of an order contained in a statutory instrument, which is subject to annulment by resolution of either House of Parliament.[248] Again, the Assembly may reconsider the measure in this case.[249]

The Secretary of State may make such an order, prohibiting the Clerk from submitting the measure to the Queen, if it:[250]

- would have an adverse effect on a non-devolved matter
- might have a serious adverse effect on water in England
- would have an adverse effect on the operation of the law in England
- would be incompatible with international obligations or national security

The order must be made within four weeks of the measure being passed (or approved if it is amended on reconsideration) or within four weeks of the Supreme Court's decision.[251]

c. *The Church of England: a comparison*[252]

The proposed power to allow the Assembly to pass measures is unusual. However, it has some parallels with the powers accorded to the Synod of the Church of England. The *Church of England Assembly (Powers) Act 1919* set up a system whereby the Synod passes measures which are submitted to Parliament for approval before they can receive Royal Assent.

The 1919 Act did not prescribe the procedures of the Synod, rather it set out the extent of Synod's powers make measures:

> A measure may relate to any matter concerning the Church of England, and may extend to the amendment or repeal in whole or in part of any Act of Parliament, including this Act:
>
> > Provided that a measure shall not make any alteration in the composition or powers or duties of the Ecclesiastical Committee, or in the procedure in Parliament prescribed by section four of this Act.[253]

[248] Clause 100 (8).
[249] Clause 97 (6).
[250] Clause 100 (1). These bullets are a summary, not a quote.
[251] Clause 100 (4).
[252] This section is by Richard Kelly of the Parliament and Constitution Centre.
[253] *Church of England Assembly (Powers) Act 1919* (chapter 76), s3

It also specified how Parliament is to consider Church of England Measures. Once a measure has been passed by the Synod, its Legislative Committee submits the measure to the Ecclesiastical Committee (which was also established by the *Church of England Assembly (Powers) Act 1919*), a joint committee of both Houses, comprising 15 peers appointed by the Lord Chancellor and 15 Members appointed by the Speaker. The Act specified the responsibilities of the Ecclesiastical Committee once it has received a measure from the Synod:

> (2) The Ecclesiastical Committee shall thereupon consider the measure so submitted to it, and may, at any time during such consideration, either of its own motion or at the request of the Legislative Committee, invite the Legislative Committee to a conference to discuss the provisions thereof, and thereupon a conference of the two committees shall be held accordingly.
>
> (3) After considering the measure, the Ecclesiastical Committee shall draft a report thereon to Parliament stating the nature and legal effect of the measure and its views as to the expediency thereof, especially with relation to the constitutional rights of all His Majesty's subjects.
>
> (4) The Ecclesiastical Committee shall communicate its report in draft to the Legislative Committee, but shall not present it to Parliament until the Legislative Committee signify its desire that it should be so presented.
>
> (5) At any time before the presentation of the report to Parliament the Legislative Committee may, either on its own motion or by direction of the Church Assembly, withdraw a measure from further consideration by the Ecclesiastical Committee; but the Legislative Committee shall have no power to vary a measure of the Church Assembly either before or after conference with the Ecclesiastical Committee.[254]

Once the Ecclesiastical Committee has reported on a measure, the measure is debated in both Houses and then, assuming it is agreed to, it is passed for Royal Assent. In 2004-05, the *Care of Cathedrals (Amendment) Measure*, the *Church of England (Miscellaneous Provisions) Measure* and the *Stipends (Cessation of Special Payments) Measure* were referred to a Standing Committee on Delegated Legislation and then formally approved on the floor of the House without debate. Neither the Ecclesiastical Committee nor either House has the power to amend a Church of England Measure.

The procedures described above were introduced in response to the difficulty in getting Church legislation through Parliament, as until the passing of the 1919 Act changes in Church legislation required bills to be passed in both Houses. The passing of the 1919 Act does not preclude bills being introduced to change Church legislation.[255]

[254] *Church of England Assembly (Powers) Act 1919* (chapter 76), s3

[255] The House of Commons Information Office factsheet, *Church of England Measures*, Factsheet L10, provides further details on the background to the 1919 Act, http://www.parliament.uk/documents/upload/l10.pdf

2. Primary legislative powers

The provisions on Stage 3 of the move to greater law making powers, "primary powers," are contained in Part 4 of the Bill. This confers on the National Assembly for Wales the power to make "Acts" which can do anything (with a few exceptions) within devolved fields that an Act of the UK Parliament can do. These provisions will not come into force unless approved in a referendum and, before that, by both Houses of Parliament and by a two-thirds majority in the Assembly. If they do come into force they will not override the continuing rights of the UK Parliament to make legislation for Wales. As a result, something would be needed akin to the "Sewel Convention," under which the UK Parliament does not normally legislate for Scotland in devolved matters without the consent of the Scottish Parliament.[256]

a. Referendum

The *Government of Wales Bill* requires a referendum to be held solely on the issue of greater legislative power for the Assembly, not on changes to the electoral system or the size of the Assembly. Part 4 of the Bill contains these provisions. If enacted, and the power used, this referendum would be the first to be held under Order in Council provisions. Until now, the franchise and question to be asked in a referendum has been set out in primary legislation at Westminster. However, section one and Schedule 1 of the *Northern Ireland Act 1998* gives the Northern Ireland Secretary power to hold a referendum at any time, under an Order, where it appears likely to him that a majority of voters in Northern Ireland believe that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland. Such a referendum has not yet been held. The 1998 Act's wording replicated that of the *Northern Ireland Constitution Act 1973*, Schedule 1. **Clause 102** provides for an Order in Council to be made providing for a referendum "about whether the Assembly Act provisions should come into effect." This is a reference to the powers to introduce primary legislation given to the Assembly in part 4 of the Bill. A simple majority of those voting yes would be sufficient to bring part 4 into effect, with the mechanism for commencement set out in Clause 104.

A draft of such an Order must be approved by each House of Parliament and the Assembly to come into effect under **Clause 103**, and two-thirds of the total number of Assembly members (40) must vote in favour for it to be approved. This threshold arrangement is unusual, the most direct precedent probably being the threshold required for referendums on devolution to take effect held in Scotland and Wales in March 1979. The required threshold of 40 per cent of the total electorate was not met in either Scotland or Wales. Further detail is contained in Standard Note SN/PC/2809, *Thresholds in Referendums*.

Schedule 6 gives more detail about the mechanics of the referendum. It sets out the franchise as the local government (and Assembly) electorate and requires the Order in Council to set out the text of the question, and the date of the poll. It allows the referendum to be combined with another election, and gives the Electoral Commission power to encourage voting.

---

[256] See SN/PC/2084, *The "Sewel Convention,"* 25 November 2005.

The Welsh Affairs Committee recommended that the wording for the question be set out on the face of the Bill, since the Bill would represent the only opportunity for all Members of Parliament to consider the wording in detail.[257] There is a precedent in the *Northern Ireland Act 1998* for not putting the question in the Bill, as noted above.

There is no set period by which a referendum may be held. It appears to be up to the Secretary of State to decide on the precise timing, but under clause 103 if two-thirds of Assembly members support a resolution that an Order in Council should be made, the Secretary of State must lay a draft of the Order before both Houses within 120 days, or give notice in writing to the First Minister of the reasons for his refusal. The Bill is silent as to methods of conciliation should the Secretary of State and the First Minister disagree, and to any period of delay after the first referendum.

There is no provision in the Bill to prevent a number of referendums being held on the question of extra powers. During evidence to the Welsh Affairs Committee, Mr Hain said that a specific provision in the Bill to prohibit repeated referendums was unnecessary, since this would be a "matter for politics."[258]

A referendum would be held under the *Political Parties, Elections and Referendums Act 2000* (PPERA), which governs spending by political parties and by "third" parties, such as pressure groups. PPERA also regulates government advertising in the run-up to any referendum, and provides funding for both "yes" and "no" umbrella groups to provide information on this case. Schedule 6 allows the Electoral Commission to provide the necessary publicity, should no umbrella groups be designated for funding by the Commission. For further details on the regulation of referendums, see Standard Note SN/PC/2064, *Proposals for a referendum on the new European constitution.*

b. Competence

Clauses 106 to 108 set out the primary powers which the Assembly would enjoy if the referendum were to approve them.

Under **Clause 106** the Assembly may make laws, known as Acts of the National Assembly for Wales, or Deddfau Cynulliad Cenedlaethol Cymru. The power of the UK Parliament to make laws for Wales is stated.[259] This is consistent with the *Scotland Act 1998*[260] and with the constitutional fact that Parliament is sovereign.

Under **Clause 107** an Act of the Assembly "may make any provision that could be made by an Act of Parliament," subject to conditions set out in the same Clause. Clause 107 (4) and (5) set out the areas of competence within which the whole of an Act must fall. The Act must relate to a subject on a list in **Schedule 7, Part 1**. These are lengthy and detailed, and readers are referred to the Schedule for the full list. However, the broad headings are exactly the same as for the 20 fields quoted above in respect of Assembly

[257] HC 551 2005-6 para 136
[258] HC 551 2005-6 para 135
[259] Clause 106 (5).
[260] Section 28 (7) thereof.

measures. In addition, Acts must not apply other than in relation to Wales, they may not extend beyond England and Wales, they must not be incompatible with the *European Convention on Human Rights* nor European law, and they must not breach restrictions set out in **Schedule 7, Part 2**.[261] The latter are similar to the restrictions on Assembly measures (mutatis mutandis), except that the provision that measures may not create criminal offences punishable above a certain level is not repeated in respect of Acts. So, under the Schedule, an Act must not remove nor modify the powers of a UK Minister or of the Comptroller and Auditor General, it must not, with some exceptions, modify the rest of the Bill, it must not modify statutory provisions that require repayment of borrowed money to be charged on the Welsh Consolidated Fund, and it must not modify the provisions of the existing Acts listed above in respect of measures (*European Communities Act 1972*, *Data Protection Act 1998* etc).

Under **Clause 108** amendments may be made to Schedule 7 by Order in Council. Such an Order will first have to be approved by resolutions of both Houses of Parliament and of the Assembly.[262]

There is a significant difference in the way that the Assembly's competence is delineated compared to the arrangements for the Scottish Parliament. In the *Scotland Act 1998* the primary powers of the Scottish Parliament are not listed. Rather, there is a list of subjects on which the Parliament cannot make law, known as "reserved matters."[263] The reverse applies in the present Bill, with the listing of the 20 fields in which the Assembly can legislate. The Secretary of State submitted a memorandum to the Welsh Affairs Committee in which he set out the reasons for this. The memorandum is quoted at length in the Explanatory Notes. It gives two practical reasons for the difference, that the list of reserved matters in respect of Wales would be very long, and that the list of devolved fields is easier to create with accuracy since it derives from the existing executive functions carried out in Wales. However, the main reason is a constitutional one:

> If the Assembly had the same general power to legislate as the Scottish Parliament then the consequences for the unity of the England and Wales legal jurisdiction would be considerable. The courts would, as time went by, be increasingly called upon to apply fundamentally different basic principles of law and rules of law of general application which were different in Wales from those which applied in England. The practical consequence would be the need for different systems of legal education, different sets of judges and lawyers and different courts. England and Wales would become separate legal jurisdictions.
>
> In order to avoid this result the simplest solution is to follow the Scotland Act 1978 model, limiting the legislative competence of the Assembly to specified subjects.
>
> The other approach having, in principle, the same effect would be to transfer general law-making powers to the Assembly but then to reserve fundamental legal principles and basic legal rules to the UK Parliament. The view of

[261] Clause 107 (6).
[262] Clause 108 (4).
[263] *Scotland Act 1998*, Schedule 5.

> Parliamentary Counsel is that such a reservation would be so complex and its effect so uncertain that the alternative of limiting devolved legislative competence to specific subjects would be by far the better approach.

c. Procedure

Clauses 109 to 115 cover the procedure on Bills and Acts of the Assembly. This will fall to the standing orders, but the Bill gives a framework for those orders. The procedure is very similar to that for Assembly measures. Under **Clause 109** Bills may be introduced by a member of the Welsh Assembly Government or by any Assembly member. As with measures, the proceedings on a Bill must have three stages, under **Clause 110**, allowing a debate and vote on its general principles, consideration and voting on the details and a final stage at which it is passed or rejected. Also as with measures, there is scope to refer a Bill to the Supreme Court and, in response, for it to be reconsidered, amended, and approved or rejected in its new form.[264] Under **Clause 113** the Secretary of State has the power to block a Bill, by order subject to annulment by resolution of either House of Parliament. The terms of this power are the same as for measures.

C. Electoral system

The changes to the electoral system have caused considerable controversy. The Welsh Affairs Select Committee split on party lines in its report on the White Paper, published on 13 December. The Committee supported the White Paper ban on dual candidacy by 5 votes to 4. The report contained criticism from the Electoral Commission of the proposed change, since its analysis of Assembly elections had not found public concern about the "Clwyd West" question.[265] The Commission cautioned against change "that is perceived to be partisan and could add to a prevailing distrust of politicians."[266] However Rhodri Morgan, the First Minister, dismissed the view of the Electoral Commission, describing it as presenting "poor unsupported claims." The Secretary of State added that it had "got this wrong," and that some of its evidence was "politically unworldly."[267]

The electoral provisions are in Part I of the Bill. This replicates most of the provisions of Part I of the *Government of Wales Act 1998* and that part is repealed in Schedule 12 of the Bill. It sets out the provisions for the election of Assembly members. Changes are needed to reflect the division of the Assembly into legislative and executive parts and to introduce new rules for the conduct of the Additional Member System (AMS) form of election. The main differences are:

- A new power to hold extraordinary general elections, where the Welsh Assembly Government has lost the confidence of the Assembly (**clause 5**). An extraordinary election would be held when at least two thirds of Assembly members vote for a dissolution or a First Minister is not elected within the 28 days

[264] Clause 110 (6) and (7).

[265] See *The National Assembly for Wales elections 2003: the official report and results*, Electoral Commission, November 2003.

[266] For example, see *Audit of Political Engagement,*The Electoral Commission, March 2004

[267] HC 551 2005-6 para 153

period set out by clause 47. Elections are otherwise to continue on a 4 yearly cycle on the first Thursday in May.

- New provisions to prevent candidates standing for both a constituency and a regional list. The provisions in **clause 7** are set out in the EN as follows:

> 54. For example, a person may not be a candidate for more than one constituency. A person may not be included by a registered political party in its list of candidates for more than one electoral region. Nor may a person who is a candidate for any constituency be included in any of a party's regional lists. Similarly, a person may not be an individual candidate for an electoral region if that person is also a candidate for any constituency or on any list of candidates submitted by any registered political party for any electoral region

In addition, **clause 11** prohibits a candidate from succeeding to a vacancy in a regional list seat where he has stood in a by-election for a constituency seat since the most recent general election. 17 of the 20 list members elected in 2003 had also stood in constituencies, and 15 had done so in 1999. There are no equivalent prohibitions on banning candidates from standing in most other AMS type of electoral system.[268] The Electoral Commission's evidence to the Welsh Affairs Committee cautioned against any change. There has been controversy about the possible effect on the quality of candidates. Evidence from academics Bradbury and Russell makes the point that Wales has most in common with the systems recently proposed in New Brunswick and Prince Edward Island in Canada, and that there is no body of fixed practice.[269] They also make the point that the abolition of dual candidacy might widen the pool of recruitment by giving more chances of winnable seats.[270]

The G*overnment of Wales Act 1998* currently prohibits candidates from standing in more than one constituency seat at the same time (section 4(7)). It allows candidates to stand for both a constituency and a regional list seat, but only where the constituency seat falls within that regional area. There are equivalent provisions in the *Scotland Act 1998.*[271] The present Bill does not prohibit Members of the Commons or the Lords from standing, nor does it prohibit Ministers of the Crown. This carries over existing provisions from the G*overnment of Wales Act 1998. The Scotland Act 1998* prohibits Ministers of the Crown from becoming members of the Scottish Executive.[272] There is no such prohibition in the present Bill. The *Electoral Administration Bill*, currently awaiting report in the Commons, will in its current draft prohibit candidates for the Commons from standing for more than one seat at a time, thus ending a tradition which dates back some centuries.[273]

---

[268] See David Farrell *Electoral Systems* 2001 for further detail

[269] Better Governance for Wales: the proposal to abolish dual candidacy in National Assembly elections-Evidence to the Welsh Affairs Committee November 2005

[270] ibid para 3.10

[271] *Scotland Act 1998* s5(2) and 5(7)

[272] S44(3) Scotland Act

[273] A new clause to this effect was added during Commons committee stage HC Deb 8 November 2005 c278

- Disqualifications provisions mainly mirror those applicable to the Commons. It is worth noting that both spiritual and secular members of the Lords are eligible for membership of the Commons. EC citizens are also eligible, if resident in the UK.[274]

- The current allocation of seats between constituency and regional list is preserved at a two to one ratio, even if there is a change in the number of overall Assembly seats. The Bill provides that Assembly constituencies will continue to have coterminous boundaries with the Welsh parliamentary constituencies, and if Westminster boundaries change, so will the Assembly ones. Schedule 1 requires the Boundary Commission for Wales to consider the implications for Assembly elections. The boundaries of the 5 electoral regions at present follow those used formerly for the Welsh seats for the European elections until 1999,[275] but these boundaries may need to change following proposals for redistribution of seats, conducted under Rules set out in para 9 of Schedule 1. Constituency seats may not cross the boundaries of regional areas. The report from the Boundary Committee for Wales containing proposals for redistribution is to be sent to the Electoral Commission, which has power to modify the proposals. The Electoral Commission was given power in the *Political Parties, Elections and Referendums Act 2000* to take under its control the four parliamentary boundary commissions, once the current general reviews have been completed.

- The *Electoral Administration Bill* also reduces the age of candidature to 18 and requires candidates to have an immigration status allowing them to be resident in the UK. These changes have not been incorporated into the present Bill. The *Explanatory Notes* to the *Electoral Administration Bill* state that "many of the amendments in the Bill regarding the conduct of parliamentary elections are being applied, or may, in due course, be applied for the purposes of other types of elections and referendums." This includes elections to the Assembly. See Library Research Paper no 05/65, *The Electoral Administration Bill 2005-6*, for further details.

- The new Assembly Commission is given power to promote awareness of the electoral system and Welsh devolution in Schedule 2, para 5. There is no such provision in the *House of Commons Administration Act 1978* for the equivalent body in the House of Commons, the House of Commons Commission. Nor is there equivalent provision in the *Scotland Act* for the Scottish Parliamentary Corporate Body.

---

[274] Standard Note no 3221 *Disqualification for Membership of the House of Commons* provides background

[275] *European Parliamentary Constituencies (Wales) Order 1994* SI 1994 no 428

D. Welsh Consolidated Fund

Part 5 (and Schedule 8) of the Bill deal with finance. The Bill is not expected to change the overall level of public spending. The Assembly's resources will continue to be determined by the Barnett Formula. Part 5 of the Bill introduces new provisions to deal with the finances of the Assembly and the Welsh Ministers. It creates a Welsh Consolidated Fund (WCF) and sets out the procedure whereby the Assembly authorises payments from the WCF. In general, payments from the WCF may only be made following a Budget resolution passed by the Assembly. The WCF thus provides the means whereby the Assembly can control the use of resources by the Welsh Ministers. It also contains provisions regarding the preparation of accounts and the role of the Auditor General for Wales.

The White Paper said:

> Scrutiny will be particularly important in relation to the Welsh Assembly Government's expenditure. The Assembly's resources are determined by application of the Barnett Formula. The current arrangement is for Parliament to vote resources to the Secretary of State for Wales, who passes them to the Assembly after taking a "top-slice" to meet the costs of the Wales Office. This arrangement will continue once the Assembly's legislative and executive elements are separated, except that it will be necessary for the Assembly, having received moneys from the Secretary of State, to vote resources to the Welsh Assembly Government and to hold the Welsh Assembly Ministers to account for the use made of those resources. The Assembly's Standing Orders relating to financial procedures will need to be adjusted to take account of both of these functions.
>
> 2.19 The Assembly's scrutiny of the use made of resources will be assisted by the work of the Auditor-General for Wales. Currently, the Auditor-General is appointed by the Crown on the advice of the Secretary of State. The Government considers that when the Welsh Assembly Government is established, as described above, it would be more appropriate for future appointments to that office to be made by Her Majesty on the nomination of the Assembly. In the same way, it is proposed that future holders of the office of Public Services Ombudsman for Wales should be appointed by Her Majesty on the Assembly's nomination. Both of these offices will assist the Assembly in holding the Welsh Assembly Ministers to account, and in the Government's view it is right that appointments to these offices should be seen to be entirely independent of executive authority in Wales.[276]

The Explanatory Notes to the Bill said:

> Part 5 puts in place new provisions, dealing with the administration of the finances of the Assembly and the Welsh Ministers. These draw on the relevant sections of the Scotland Act 1998. But the provisions concerning the manner in

[276] *Better Governance for Wales*, June 2005, Cm 6582

which the Assembly will decide on the spending plans of Welsh Ministers (and others) represent a new model.[277]

a. *Establishing the Fund*

Clause 116 establishes the Welsh Consolidated Fund (WCF).

Clause 117 requires the Secretary of State to make payments into the WCF from the moneys voted by Parliament to the Secretary of State. The money voted by Parliament will be determined by the Barnett Formula.[278] The Secretary of State will subtract the expenses of the Wales Office and pay the remainder into the WCF. This clause also allows any Minister of the Crown and any government department to make payments to the Welsh Ministers, the First Minister or the Counsel General. Under clause 119(1) such payments will normally be paid into the WCF.

Clause 118 requires the Secretary of State to lay before the Assembly a written statement with an estimate of payments to be made into the WCF. It must also contain an estimate of the sums to be paid to the Welsh Ministers, First Minister and Counsel General (whether by Ministers of the Crown, government departments or others). The statement must also show how much of the Welsh Block Grant the Secretary of State proposes to deduct to meet the expenses of the Wales Office. The statement must be laid at least four months before the beginning of the financial year.

Clause 119 allows for provision to be made so that certain receipts are dealt with other than by payment into the WCF.

b. *Borrowing*

Clause 120 provides for borrowing by the Welsh Ministers from the Secretary of State. Borrowing is permitted for the purposes of covering a temporary deficit in the WCF or to provide a working balance.

Clause 121 sets a maximum of £500m on this borrowing.

Clause 122 requires the Secretary of State to prepare accounts in respect of these loans. The accounts are to be sent to the Comptroller and Auditor General. The Comptroller and Auditor General must lay copies of these accounts and a report on them before each House of Parliament.

---

[277] para 433

[278] The reference to the Barnett Formula is in the Explanatory Notes (para 434) rather than the Bill itself. See RP 01/108 for more detail: http://10.160.3.10:81/PIMS/Static%20Files/Extended%20File%20Scan%20Files/LIBRARY_OTHER_PAPERS/RESEARCH_PAPER/rp01-108.pdf

c. Payments out

Clause 123 governs payments from the WCF. Generally, payments can only be made on the authority of a Budget resolution passed by the Assembly. There will be a few cases where a payment may be made without the need for a Budget motion because the sum has been "charged on" the Fund by an enactment. Other cases where payments may be made without a Budget resolution are covered by Clauses 126, 127 and 129.

Clause 124 requires an annual Budget motion to be moved in the Assembly. This may only be done by the First Minister or another Welsh Minister. This motion seeks approval for the amount of resources to be used for the "services and purposes" specified in the motion, the amounts of accruing resources which may be retained (rather than being paid into the WCF), and the amounts of cash which may be issued from the Fund.

Clause 125 allows one or more Supplementary Budget motions to be moved in the Assembly. This can only be done by the First Minister or another Welsh Minister. Such motions may authorise additional use or retention of resources for the specified services and purposes, or it may add additional services and purposes and authorise resources for them.

Clauses 126 and 127 cover exceptional cases where payments may be made from the Fund without a Budget resolution. **Clause 126** covers the situation where no Budget resolution is adopted by the beginning of the financial year. In this situation, resources for services and purposes may be used up to a maximum level defined as a percentage of the previous year's provision for that service or purpose.

Clause 127 deals with contingencies. It allows resources to be used, up to a specified maximum, in an emergency where Welsh Ministers judge that the expenditure is in the public interest and it is not practical for reasons of urgency for a Budget motion to authorise the spending. Welsh Ministers must lay a report before the Assembly explaining their action.

Clause 128 deals with "approvals to draw". Payments from the WCF cannot be made unless the Auditor General for Wales (AGW) grants an approval to draw.[279] Before such approval is granted, the AGW must be satisfied that the conditions in clause 123 have been met. This clause also designates the Permanent Secretary to the Welsh Assembly Government as the principal accounting officer for the Welsh Ministers.

Clause 129 allows payments made into the WCF by mistake to be paid out of it without the need for a Budget resolution.

---

[279] Schedule 8 deals with the Auditor General for Wales. The AGW is now to be appointed by Her Majesty on the nomination of the Assembly. Previously, such a nomination was not required although in practice the Assembly was consulted informally.

d. Accounts

Clause 130 requires the Welsh Ministers to prepare accounts for each financial year in line with directions from the Treasury. Welsh Ministers must submit their accounts to the AGW who, in turn, reports on the accounts to the Assembly.

Clause 131 requires the Welsh Ministers to prepare an account of payments into and out of the WCF, in accordance with directions from the Treasury. These accounts must be submitted to the AGW. The AGW must report to the Assembly.

Clause 132 deals with accounting officers.

Clause 133 gives the AGW a right of access to documents and information relating to the accounts of any subsidiary of the Welsh Ministers. It also gives the AGW the right to explanation or assistance from any person holding or accountable for such documents.

Clause 134 allows the AGW to carry out value for money examinations of the way in which the Welsh Ministers have used their resources. The AGW must take into account the views of the Assembly's Audit Committee. The AGW may, but is not required to, report on these examinations to the Assembly.

Clause 135 allows the Comptroller and Auditor General to examine payments into and out of the WCF and report the results to the House of Commons. If the Comptroller and Auditor General reports to the House of Commons, then the report must be laid before the Assembly at the same time. This clause also deals with the Comptroller and Auditor General's right of access to documents.

e. Assembly Commission

Clause 136 requires the Assembly Commission to prepare accounts for each financial year, in accordance with directions from the Treasury. The Assembly Commission must submit the accounts to the AGW who is required to report on them to the Assembly.

Clause 137 designates the Clerk of the Assembly as the principal accounting officer for the Assembly Commission.

Clause 138 gives the AGW a right of access to documents and information relating to the accounts of any subsidiary of the Assembly Commission.

Clause 139 allows the AGW to carry out value for money examinations of the way in which the Assembly Commission has used its resources. The AGW must take into account the views of the Assembly's Audit Committee. The AGW may, but is not required to, report on these examinations to the Assembly.

Clause 140 relates to Whole of Government Accounts.[280]

---

[280] http://www.wga.gov.uk/

Clause 141 requires the AGW to examine accounts submitted under Clause 140. The AGW must report on the accounts to the Assembly.

f. Audit Committee

Clause 142 concerns reports by the Audit Committee of the Assembly. The Audit Committee may consider and report to the Assembly on any accounts, statement of accounts or report laid before the Assembly by the AGW (or the AGW's own auditor). The Audit Committee may thus provide a further level of scrutiny in addition to that provided by the AGW. This clause also allows for the Audit Committee, if requested to do so, to take evidence on behalf of the House of Commons Committee of Public Accounts and to report its findings to that Committee. The persons from whom the Audit Committee can take evidence under this power are set out in this clause.

g. Documents

Clause 143 requires the Assembly to publish certain documents as soon as is reasonably practicable after they have been laid before the Assembly. The documents are listed in clause 143. They include:

- any accounts, statement of accounts or reports laid before the Assembly by the AGW;
- reports by the Audit Committee on accounts, statement of accounts or reports laid before the Assembly by the AGW; and
- the annual estimate prepared by the AGW of the income and expenses of the AGW's office.

h. Auditor General for Wales

Clause 144 provides for the continuation of the Office of the Auditor General for Wales, first established by section 90 of the *Government of Wales Act 1998*. Schedule 8 makes further provision relating to the office of the AGW. The AGW's position is buttressed by these provisions; he is to be appointed only after a vote of the Assembly and there is an explicit declaration of his independence from the Welsh Assembly Government.

E. Reactions to the Bill

Mr Hain wrote an article in the *Western Mail* on 8 December 2005, the day the Bill was introduced in the House of Commons. He said,

> This is an historic day for Wales; opening up another new dawn for devolution like that famous one in September 1997.
>
> The Bill will give the Assembly much greater autonomy to deliver bigger and better policies more easily and I hope Opposition parties in Parliament will support it.

Ieuan Wyn Jones, Plaid Cymru leader in the NAW, said,[281]

> the contents of this Bill are timid in comparison to those advocated by the £1m cross-party Richard Commission that New Labour set up. Once again we have seen New Labour put narrow party interests first rather than the interests of Wales.

Elfyn Llwyd said that the process in the Bill for enhanced legislative powers was "unacceptably slow."[282]

Nick Bourne, Conservative leader in the Assembly, described the Bill as "nothing more than a cobbled together compromise which offers little prospect of stability and progress for the people of Wales."[283]

Lembit Opik said "this Bill is a step in the right direction, but it is a timid step, taken at a time when we could have, and should have, taken a great leap forward."[284]

In evidence to the Welsh Affairs Committee the Electoral Commission welcomed the proposal to give the Assembly powers to promote voter participation:[285]

> We believe this will be beneficial to voters and look forward to working alongside the Assembly in fulfilling our own duty to promote public awareness of the 2007 Assembly elections. Promoting participation at elections is, of course, the collective responsibility of all involved in the electoral process.

The Commission was less positive on the proposals to prevent dual candidacy. It set out criteria which it felt should be satisfied:[286]

> (i) the change and the reasons for modifications should be comprehensible to voters;
> (ii) the change should be "fair" and be seen to be fair in the eyes of voters;
> (iii) there is a need to avoid of accusations of partisanship, which could impact adversely on participation; and
> (iv) there is a need to consider broader context, including the potential impact of any change on other electoral systems in the UK.

After considering voter attitudes, international comparisons and the views of political parties, it concluded:[287]

---

[281] *Western Mail*, 9 December 2005.
[282] *Western Mail*, 9 December 2005.
[283] *Western Mail*, 9 December 2005.
[284] *Western Mail*, 9 December 2005.
[285] HC 551 2005-06, Ev 37.
[286] HC 551 2005-06, Ev 38.
[287] HC 551 2005-06, Ev 39.

> 32. Our main consideration is the voter's perspective. In light of the need to encourage voter participation at the Assembly election in 2007, we would caution against any change that is perceived to be partisan and could add to a prevailing distrust of politicians.
>
> 33. On the evidence available to the Commission, which we have reviewed above, we do not believe that the case for change has been made out.

The Electoral Reform Society also criticised this proposal. Chief Executive Ken Ritchie said, "instead of this artificial ban, we would rather see a change in the voting system so that all Assembly Members are elected in a similar manner."[288] He said that the Electoral Reform Society favoured the STV system advocated by the Richard Commission: "under STV, all members are elected by the same method."

In evidence to the Welsh Affairs Committee the Electoral Reform Society put forward a number of criticisms of the Government's approach. It suggested that the tension between regional and constituency members was inherent in AMS, and that the question was secondary as to whether individuals had run against one another only for each to be elected. Again, the solution in its view was to elect all members on the same basis, that of STV.

The Society also drew attention to widespread scepticism over the impact of the proposed change:[289]

> 4.5 We are nevertheless deeply concerned that the proposal of the White Paper is one that will do little if anything to improve the electoral system, is one that will have little impact on the Labour Party in Wales, but is one that will be of great disadvantage to the opposition parties in Wales which fight constituency seats but generally rely on list seats for their representation. Some might surmise that, given the very flimsy democratic reasons for the White Paper's proposals, the real intention is to put obstacles in the way of the Government's opponents. We would hope that any Government would be extremely cautious in proposing changes which are likely to be to its electoral advantage, but where the Government holds a majority on only 35% of the vote (and only 42.7% of the vote in Wales) we would be opposed to any change on which there was not a broad consensus.

The National Assembly for Wales is scheduled to discuss the Bill in Plenary on 18 January 2005.

---

[288] *Western Mail*, 12 December 2005.

[289] HC 551 2005-06, Ev 85.

IV Annex A

National Assembly for Wales 2003 election, seats won by seat type, party and region

	Region					
	Mid & West Wales	North Wales	South Wales Central	South Wales East	South Wales West	Total
Constituency seats						
Labour	3	6	7	7	7	30
Plaid Cymru	3	2	0	0	0	5
Conservative	0	0	0	1	0	1
Liberal Democrat	2	0	1	0	0	3
Independent	0	1	0	0	0	1
All parties	*8*	*9*	*8*	*8*	*7*	*40*
Regional seats						
Labour	0	0	0	0	0	0
Plaid Cymru	1	1	2	1	2	7
Conservative	3	2	2	2	1	10
Liberal Democrat	0	1	0	1	1	3
Independent	0	0	0	0	0	0
All parties	*4*	*4*	*4*	*4*	*4*	*20*
All seats						
Labour	3	6	7	7	7	30
Plaid Cymru	4	3	2	1	2	12
Conservative	3	2	2	3	1	11
Liberal Democrat	2	1	1	1	1	6
Independent	0	1	0	0	0	1
All parties	*12*	*13*	*12*	*12*	*11*	*60*

Source: House of Commons Library Research Paper 03/45 *Welsh Assembly elections: 1 May 2003* (2003)

V Annex B

Bills and bill provisions which could have been enacted by the National Assembly for Wales under the proposed new Order in Council power by which Parliament would be able to give the National Assembly power to legislate on specific topics in the devolved fields, Deposited Paper placed in Lords Library, 15 June 2005, HINF 2005/271

Setting up the National Council for Education and Training for Wales (*Learning and Skills Act 2000)*

Setting up a Children's Commissioner for Wales (*Care Standards Act 2000/Children's Commissioner for Wales Act 2001)*

Setting up Local Health Boards (*National Health Service Reform and Health Care Professions Act 2002)*

Setting up Community Health Councils, Wales Centre for Health, and Health Professions Wales (*Health (Wales) Act 2003)*

Setting up a new Health and Social Services inspections regime (*Health and Social Care (Community Health and Standards) Act 2003*

Providing for a Social Housing Ombudsman for Wales (*Housing Act 2004)*

Providing for a Wales Spatial Plan (*Planning and Compulsory Purchase Act 2004)*

Setting up the Wales Audit Office (*Public Audit (Wales) Act 2004)*

Changing the Schools Inspections regime in Wales (*Education Act 2005)*

Setting up the Public Services Ombudsman for Wales (*Public Services Ombudsman (Wales) Act 2005)*

Examples from proposed legislation:

Banning smoking in public places in Wales (*Health Improvement and Protection Bill)*

Providing a tourist accommodation registration system for Wales (*Tourism Accommodation Registration (Wales) Bill*

Wales Office June 2005